
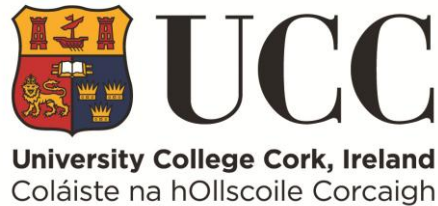


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**Ollscoil na hÉireann, Corcaigh**  
**National University of Ireland, Cork**



**Crossing Language Lines and Legal Tradition Lines—Legal Translation  
as an Economic Phenomenon**

Thesis presented by

**Hungpin Pierre Hsieh**

for the degree of

**Doctor of Philosophy**

**University College Cork**

**Texts, Contexts and Cultures (CACSSS)**

Head of College: Professor Chris Williams

Supervisors: Brendan Dooley, Patrick O’Callaghan and Joseph Eynaud

2018

## **Crossing Language Lines and Legal Tradition Lines—Legal Translation as an Economic Phenomenon**

### **Abstract**

Translation is a task challenging enough, and legal translation is a task that is even more so. This is because not only is human language unique, but the law is also unique in that it reflects the culture of the time and place. Just as languages are grouped into families that originate from a particular protolanguage, so are laws, or more specifically jurisdiction-based national bodies of law. As a result, several legal traditions have evolved around the world, each of them viewing the “legal world” in a very different way through very different “law lenses”, with each of them being expressed in a different human language—most likely an official language of the jurisdiction. In one word, there is probably no uniform way of approaching and understanding the laws and norms of every society. Against this backdrop, it would not take too much imagination for one to understand how difficult and problematic legal translation, the process of expressing a piece of legislation or witness (mis)representation presented in one language from one jurisdiction in another language, could actually be. This is why translation has seen quite a few turns over the past few decades, with scholars trying to ascertain the true nature of translation from different angles by establishing different turns that come with specific perspectives and approaches. In this research of mine, I would like to demonstrate that legal translation that involves a change in legal tradition will likely be more complex than legal translation that involves two jurisdictions that belong to the same legal tradition, and that this could be accounted for by means of economics. As such, the legal translator will be portrayed as a rational and self-interested economic being that is constantly calculating and weighing all potential costs and benefits in the line of his work for the ultimate maximization of his profit/utility. It is my belief that while jurilinguistics, the synergy of the law and language as well as translation, has been making a great effort in theorizing the language of the law, most problems arising from legal translation, insofar as legal language and legal tradition are concerned, would be best explained via economics, making an economic turn of translation studies helpful, if not indispensable. By way of some examples from bijural and/or

multilingual jurisdictions around the world (most notably Canada, Switzerland and the European Union), and by means of a range of economic trajectories such as risk, game theory, moral hazard and externalities, I will endeavour to show my readers that legal translation is actually a very economic, as well as economical, process, while, in fact, the use of official term banks and the legislation co-drafting procedure are, despite their conspicuous purpose to help the legal translator navigate and weather the difficulties of translation, also a direct result of some very economic thinking and logic. Further, in my final section, I will argue that legal drafting that involves a change in legal tradition, which has been a topic of research of jurilinguistics featuring only limited publication hitherto, should become the subject of economic analysis too, as economics may well have strikingly innovative and sophisticated input for it. To this, the practice of co-drafting as carried out in Canada and Switzerland, as well as the reception of Western law by Japan and then subsequently by a handful of Asian countries via Japan will be briefly covered under jurilinguistics for its very relevance. Most of all, in light of the several turns that have occurred and flourished in translation studies scholarship over the past few decades and the impact they have had on the theory and practice of translation, I would like to present to the young discipline of translation studies yet another turn, a turn that I believe is scientific and helpful: the economic turn. I think that only through the adoption of rigorous economic methodology—alongside those of sociology and all others—can the true nature of legal translation as a human activity be ascertained and the in-depth mode in which legal translation is actually carried out be fully understood and justified.

**Key words:** Legal tradition (legal system), comparative law, legal translation, economics, law and language, turns of translation studies, jurilinguistics, economic methodology

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## **Declaration**

### **Declaration of Academic Integrity:**

This is to certify that the work I am submitting is my own and has not been submitted for another degree, either at University College Cork or elsewhere. All external references and sources are clearly acknowledged and identified within the contents. I have read and understood the regulations of University College Cork concerning plagiarism.

**Name: H. Pierre Hsieh**

**Date: 25 September 2018**



## Introduction

### A. Overview

To begin with, as the title suggests, I will examine and re-examine the translation phenomenon in general, and legal translation in particular, from an economic perspective with a view to complementing the contribution that the sociological perspective and the cultural perspective have made for translation studies in the form of turns and shift over the decades. To this effect, this thesis has been organized into four interrelated chapters on top of an introduction chapter plus a conclusion chapter.

Translation is an age-old trade where human beings attempt what may appear to be the impossible, and the issue of (non-)translatability seems to be haunting translators since the dawn of time. While the different expressive powers for different forms of information featured in different languages (hence translatability) are acknowledged and accepted by most linguists (Everett 294), to this day, there are still academics questioning—however frivolously—the need to translate at all.<sup>1</sup> Meanwhile, there have long been all sorts of chestnut-type jokes about translators and translation such as *Traduttore, traditore!* (literally “The translator, the traitor!”) and *Les belles infidèles* (“The unfaithful beauties”), which bitterly reflect the general public’s impression of translators and their work as little more than concealment coupled with embellishment. Granted, human civilization could not have survived without the human language faculty, and different languages, along with the cultures associated with them, have different ways of expressing ideas (or, in Saussure’s words, each language possesses its own signs to denote things), time, speaker-addressee relationships and concepts—legal ones included. The potential disparities that originate in these differences may involve grammar (features and phenomena such as number and tense in some languages versus the lack thereof in some others), phonetics or terminology (or all of them). The truth is, language does more than just mirror reality; it actually shapes meanings, and, unbeknownst to even translators themselves maybe, translators take part in that shaping process (Bassnett 2002: 10). At the same time, as jurisprudence scholar Steven

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<sup>1</sup> G  mar, for one, has “To translate or not to translate?” as one of his chapter titles in his work *Catching the Spirit of the Law: From Translation to Co-drafting*, G  mar in Glanert, 2014, pp. 67-84.

Smith notes, every use of language presupposes *some* ontological inventory (italics original) (Smith 2004: 10). In other words, in a way, language *defines* reality.

Nothing more true can be said of legal language and also, by inference, legal translation, a translation genre that probably constitutes a special category of its own within translation. Not only does legal translation, as a genre of translation, involve the field of translation studies, it also touches on law, or comparative law in particular, for its footing in legal science. Exact translation is impossible (Ibid. 29), and this would have grave implications for legal translation in that how a law is rendered into another language will have a direct impact on how the law is understood and received in that target language. When the wording of the law is being rephrased or paraphrased in another language, the complexity and opacity featured in the law will add to the already heavy burden of language proficiency required of the translator, and this will, in turn, definitely place an enormous strain on the physical and mental capacity of the legal translator. On top of that, the law must be made fair, accessible and predictable to all—it must be capable of fulfilling the same legal functions—regardless of the language used to express it (hence the proverb “Nobody is above the law”) in the target culture, and this will require that the law being translated be duly understood by the target culture. It is presumably because of this reason that, with few exceptions, most scholars—no matter how liberal and open-minded—seem to resort to literalism when it comes to legal translation (Wolff in Malmkjær and Windle 228). This will inevitably place an even heavier burden—both physically and mentally—on the legal translator. In this sense, then, legal translation has an indispensable function to fulfill that must be cherished and respected, and this is where the cultural turn comes into play.

Whether or not one subscribes to the idea that there exists a mysterious inherent link between language and legal tradition, the translation of law (this includes legal documents and verbal courtroom discourse and the like) touches on—perhaps even challenges—the doctrines of bilingualism and bijuralism, which, if evoked simultaneously, place extra pressure on bilingual and bijural jurisdictions like Canada. As Cornu once put it, bilingualism accompanied with bijuralism puts a country “at the highest level of complexity” (Cornu 1995:13), the reason being that while the gap between two languages

may be wide, the gap between two legal traditions (or legal systems) could be even wider. While whether or not a given legal tradition is inherently associated with one (or several) particular languages is debatable, it is an undisputable fact that English has always been the predominant medium of instruction and communication in almost every common law jurisdiction, none of which has either French or German (or any other Indo-European language) as its official language—with the notable exception of Canada. This is exactly what makes legal translation across legal tradition boundaries all the more complex.

For better or for worse, equivalence used to be one of the most sought-after values for the translator, and even after the “official launch” of the cultural turn of the 1980s and then into the 90s, equivalence was never totally forgone by translation theorists. Yet, to be sure, what can be achieved by translators is at best probably “functional equivalence”, which is not a value of right or wrong but rather one of degree, or “dynamic equivalence”, the form of equivalence introduced by the Bible translation scholar of consequence Eugene Nida that underscores the equivalence in effect of the source text on the source reader. When people began to understand and accept this, the age-old cliché about translation being faithful to (hence the humorous –but rather sexist—allusion *les belles infidèles*, which claims that a woman could either be beautiful or faithful but never both) or betraying the original (hence the saying *Traduttore, traditore!*) began to take a back seat to new perspectives on the manipulative—sometimes almost absolute—power enjoyed by the translator, which may work like a double-edged sword (Bassnett 2002: 10). Now, translation is starting to move quietly and slowly away from merely transcribing meanings towards transforming the culture that accompanies the text, and if we are to accept the definition of culture as the *ensemble* of knowledge, proficiency and perception, as is the underlying position of the cultural turn of translation studies (Snell-Hornby 55), then perhaps the clichéd “cultural competence”, or the competence in handling conflict amongst cultures, would be required of the successful legal translator. Though not a translation theorist herself, Susan Berk-Seligson argues for the importance of cross-cultural awareness on the part of the courtroom interpreter when handling legal concepts that lack a convenient one-to-one equivalence (Berk-Seligson 234). This is especially true of translation of culture-specific terms and

phrases, often known as “culturemes”<sup>2</sup>. This points us to something beyond the normal command of language, and perhaps even cultural “savviness” would make for a better description of this translator’s quality. This overall formed the *début* of the cultural turn. Now translation advanced from an exclusively bilingual activity to a dualistic activity that would be just as cultural as linguistic, but acquisition of both these qualities at the same time was no easy task, as bilingualism and biculturalism are two monumental ideologies for which a compromise is often hard to make.<sup>3</sup>

Then things became even more complicated when legal translation started to get off the ground across translation scholarship. While the difficulty with translating culturemes in general, which requires sophisticated knowledge of all cultures concerned, was acknowledged by translation theorists at a very early stage, the need for excellent legal expertise on the part of the legal translator has had to take a back seat for a long time (Glanert in Glanert 2014: 14). While the problem of (un)translatability that arises in the course of translation is not unique to legal translation (true, it happens in religious scripture translation too), it does have special ramifications for the legal translator, who is entrusted with the task of rendering a legal text—a normative text—into something that comes with “equal” legal effects for the target audience to understand and comply with (and to get punished for in the event of non-compliance). In a sense, the cultural turn, the school of thought that claims that the translator should, in light of the purpose of the translation, serve the interest of the target culture without excessively rigid adherence to linguistic equivalence, may work in the legal translator’s favor. Admittedly, legal translation would not be possible without some background knowledge of the laws of both the target culture and the source culture. Just think about the highly specialized training in a few restricted areas of knowledge on top of the extremely high level of general knowledge required of a top-flight legal translator or a parliamentary interpreter, and one will be able to understand why bilingual proficiency *per se* cannot guarantee one an interpreting job at NATO or the United Nations (Harding and Riley 127-128). Now, the legal translator needs to be bijural

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<sup>2</sup> Here I would like to define the term “cultreme” conveniently as any lexical item that is profoundly marked by a certain culture. The Japanese term *okaeshi* (lit. “gift returning”) would be a typical example thereof.

<sup>3</sup> This has been demonstrated by Jane Jenson and Rachel Laforest in their paper entitled *From Biculturalism to Bilingualism*, which is an essay included in the edited monograph *Language Matters*, cited several times herein. *Vide* Jenson and Laforest in Cameron and Simeon, pp. 121 *et seq.*

in addition to being bicultural and bilingual (which are already qualities expected of all translators in the first place).

The cultural turn was indeed a revolutionary turn and shift for translation theory as it diverted attention from an age-old value (i.e., equivalence, especially strict alignment) that was taken for granted for a long time to something more functional and practical, which inevitably came with more constraints and restrictions, internal or external. This, apparently, was a result of the influence from ideologies like deconstruction and post-colonialism (Munday 11). In response to this trend, scholars have introduced several turns and paradigm shifts, all in an attempt to ascertain the true nature of the translation phenomenon by explaining and justifying the actions of translators in real-life situations. This describes the history of the cultural turn and the sociological turn of translation studies—the two most influential shifts in research paradigms. Of course, the cultural turn has had many more implications for translation studies, which will be covered later. If translation theorists are eager to look at translation from the perspective of the translator—the person doing the translating (Is the translator a cultural mediator?)<sup>4</sup>, then more could be said of him about his human nature and personality traits. Feeding into this trend, I would like to introduce economics and its methodology onto the scene, which will hopefully make the long-awaited coda of a drama that deserves all-over applause—for two major reasons. First, on a tactical level, translators are human beings who behave and misbehave and who like and dislike, and economics is a behavioural science that does a good job explaining all of that. Economists, for all we know, are constantly looking outside their habitual “dens” and “niches” such as supply and demand, elasticity and inertia, money supply and interest rates, in search of a better understanding of the “larger picture” of human behaviour in an increasingly broad variety of contexts and situations, and, fortunately, translation can be one of them. In fact, there are signs that language and translation are starting to win the attention of economists. Secondly, understanding translation in this way will be compatible with the cultural turn, which places particular emphasis on the purpose of the translation task at issue, taking into full account factors like the target readership and the text type. Thus, amid our times of interdisciplinarity and diversity, economics, following in the

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<sup>4</sup> *Vide* Jeremy Munday, 2009, pp. 88-89.

footsteps of sociology, could form yet another vital pillar for translation studies, given its specific and unique subject matter and methodology. Since considerable work has been done for sociology and translation studies, I would like to contribute my insight to the further development of translation studies by presenting a proposition on economics and translation studies. Hence my topic.

Before we move on to some key terms, I would like to stress that, as George Steiner stated, the literature on the theory, practice and history of translation is quite extensive (Steiner 1998: 248), and while there has been plenty of literature on equivalence as it concerns translation, it is nonetheless my firm belief that, however difficult their job is, legal translators are supposed to be natural and competent construers of legal texts, and they do have the power to shed new light on the meaning of a legal document or a piece of legislation, thereby contributing to its clarification or even the discovery of its true intent. There is nothing untoward about this. This belief of mine resonates with French philosopher Roland Barthes' key claim in his influential work *The Death of the Author*: the birth of the reader must be ransomed by the death of the author, and giving a text one more read would be akin to giving it a new life.

## **B. Literature Review**

To begin with, since my research is about an innovative approach to legal translation from a new perspective—the economic perspective, economics literature will account for a considerable proportion of my literature review. Indeed, my project involves a huge number of academic disciplines, including law, translation studies, linguistics, economics, and, to a lesser extent, philosophy, especially moral philosophy (ethics), making my research an interdisciplinary one. My primary resources are, of course, scholarly books (monographs and edited volumes) and articles published in these fields, all of which were carefully screened for reliability and relevance.

Due to the interdisciplinary nature of my research, an extensive and exhaustive literature review across all disciplines concerned will be essential for a workable conceptual framework. Most importantly, the recent developments in translation theory, typically in

the form of turns, will be what I would like to build on for this research project on legal translation, as I understand that translation theorists have made considerable contribution to theory by treating translation as a phenomenon in a variety of contexts, and I would like to frame my research problems not just from my perspective but also from the point of view of translation theorists. Thus, instead of developing an economic turn, which is supposed to be innovative and creative, just to replace and override all current turns, typically the sociological turn, I intend to build on extant literature and knowledge with a view to expanding the reach of legal translation without encroaching on the territories that are already claimed. This way, hopefully, researchers in most fields will benefit from what I am endeavoring, and hence my choice of literature.

Since the phenomenon being studied and investigated by me is essentially legal translation—a genre of translation—with economics serving as a source of methodology, I naturally had to go through translation studies literature very extensively for its core ideas and arguments, especially those that touch on the sociological turn, one of the best-known turns of translation. I am by no means trying to substitute sociology with economics for my arguments; quite to the contrary in fact; I have found literature on the sociological turn of translation studies especially useful for the construction of my own “turn”—the economic turn. Since I am in my element when discussing translation, for my literature on translation studies, I started off with monographs and textbooks at the basic and introductory level, where most of the big names, such as Pym, Venuti, Baker, Wolf, Bassnett and Snell-Hornby, have left a wealth of traces and marks throughout translation scholarship. In this respect, I covered textbooks and introductory works such as Susan Bassnett’s *Translation Studies*, not to mention references like dictionaries (general and specialized), compendiums (notably Jeremy Munday’s *The Routledge Companion to Translation Studies*) and encyclopaedias. Of these influential translation theorists, Pym, as we will find out later, is probably the only one who has explicitly written on economics and its periphery as it concerns translation, following in the footsteps of Jiří Levý, whose work *Translation as a Decision Process* (which is collected in *The Translation Studies Reader*, edited by Venuti) will be mentioned many times herein.

Translation studies has prided itself as an interdisciplinary field of inquiry for a long time, most notably since the start of the cultural turn (Munday 11). This is accentuated with a large scope of translation research which can be further divided into a pure and an applied sector. Therefore, I had to look at works on inter-/multidisciplinarity as a philosophy such as Klein's *Humanities, Culture and Interdisciplinarity* and Moran's *Interdisciplinarity*. Moreover, since translation studies has forged several interdisciplinary undertakings with a number of vintage subjects of study, notably sociology, I was in no want of literature on interdisciplinarity that would provide me with input on how an interdiscipline between translation studies and economics would be possible. In addition, for the sake of a more panoramic view on interdisciplinarity and what it does for pure human knowledge as demarcated by conventional disciplinary boundaries, and in light of the terms specific to translation studies, such as the omnipresent dogma of (un)translatability that translation theorists would like to know how to deal with more scientifically (Bassnett 132-133), I believe that the interdisciplinary nature of translation studies must be thoroughly studied and handled properly. Ironically, though, the term *interdisciplinary* does not come up in translation studies literature as often as one would expect it to. In any case, works such as Wolf's *Constructing a Sociology of Translation* and Snell-Hornby's *The Turns of Translation Studies* were two of the most canonical (as well as useful) works on the interdisciplinary perspective of translation studies, and together they all but confirm the interdisciplinary nature of translation studies.

Then for economics, I consider myself fortunate to be able to build on a good deal of existing works, most of which are heavyweight and rigorous ones, completed by various economists, whose arguments and methodologies I will be enlisting for my research. On the other hand, however, since economics, despite its prestigious status in academia, is still a rather untouched subject area for translation studies, I have had to refer to works in economically interdisciplinary areas, particularly law and economics, arguably the most influential movement in legal scholarship since the days of legal realism (Posner 182). This was necessary because I wanted to show the usefulness of economics through an analogy. Of course, in this regard and because I consider translation as an economic activity and an economic phenomenon through and through, before I go on, a special mention of Nobel laureate in economics Gary Becker, the author of *The Economic Approach to Human*



*Behavior*, must be made here. According to Becker, while the economic approach will provide a new perspective on all types of human behavior (for me, translation being one of them), this by no means indicates that the economic approach is necessarily more important—or even more desirable—than those held by other social scientists (Becker 14). The value and sanctity of other social sciences (such as sociology) will not be compromised by one bit after an all-out acceptance of the economic approach; they will actually be enhanced because of it. The works of other prolific authors of law and economics such as Richard Posner, Robin Malloy and David Friedman will be frequently cited, as well as the hornbook *Law and Economics in a Nutshell* by Harrison.

In addition, as a powerful antithesis maybe, Marxist economics will be cited, though to a much lesser extent. As we know, Marx emerged at a time when capitalism, after having been developing in full gear thanks to advances in technology after the Industrial Revolution, experienced its first failure and caused a knock-on effect on the massive working class, or the *proletariat*, in Marxist terminology. While the collapse of the Soviet Union and the Eastern Bloc led some to (wrongly) believe in the demise of Marxism and socialism, academic research on the two ideologies, which are closely related, has never stopped or even diminished; instead, it has flourished, if anything. This is why I had to refer to the thoughts of Marx, however briefly, during the generalization of my ideas and the write-up of my thesis even if this merely means building a contrast between the views on human nature of the two apparently divergent ideologies of Marxism and capitalism. Therefore, I referred to the book collection of monographs *Marx for Today*, which provided me with a view on how Marxism could be and should be understood and applied today. Please take note, though, that, because of time constraints, my discussion of Marxism will basically be in the context of economics only.

The central research questions for this thesis include:

Due to the fact that I am using economics as a methodology, it would only be natural that, as far as economics is concerned, I need to look beyond the confines of law and economics for my information and data, and so I reviewed a number of economics textbooks, as well

as economics books that are more theme-specific, such as *Macroeconomic Theory* and *A Course in Public Economics*—also with the help of the *Oxford Economics Dictionary* that I was able to consult for a professional term or phrase that I come across that is not clear to me from time to time. In addition, some economics works that are mostly descriptive in nature that intend to re-examine the science of economics from the inside in a critical and introspective manner were included in my bibliography for their stance on the status of economics, Reder's *Economics: The Culture of a Controversial Science* being an important one. Finally, a number of fiction-like economics works (some of which were once bestsellers) such as *Freakonomics*, *Common Wealth* and *The Paradox of Choice* that are geared towards the general public were essential for me too as I believe that popular knowledge of economics could be an extra source of inspiration for new insights. All in all, all this was done with one ultimate goal: as much exposure to economics for me as possible.

Since the field of economics is a vast and complex one with various subfields branching out close to and even beyond its regular boundaries with other social sciences, I consider it imperative that I focus my attention on the concepts/parameters and models that concern me most. At the same time, law and economics is one of the interdisciplines that have been most successful for the application of economics, and it is also one that I am relatively familiar with. Therefore, I read through a great number of works on law and economics that were authored by some of the leading academics in the area, such as David Friedman, Mitchell Polinsky and, of course, Richard Posner. Most notably, works by Posner, arguably the leading figure in the law and economics movement that eventually brought about a robust and sweeping impetus on both law and economics (as two disciplines) are worthy of the utmost attention, and, as such, his well-known works *Law and Literature* and *Frontiers of Legal Theory* were fair game. At the same time, David Friedman, who has also published rather extensively on law and economics as an economist, is also another one of the authors/academics at the top of my literature review reading list. Unlike Posner, who sounds more scholarly and intellectual in his publications, Friedman's works—which are no less authoritative and informative—are more geared towards the general and lay public. Hence, for a full and complete law and economics literature, I reviewed both writers' works with more or less an equal effort, with special focus on Friedman's *Law's Order* and

*Hidden Order*, from which I obtained immense inspiration and in-depth knowledge (not to mention in-group humor). Last but not least, the book *Paying the Piper*, a book by Alan Peacock, a musician and economist, provided me with profound insight into the music industry and how financial issues and economic issues ought to be dealt with there. This work of his is highly empirical in nature and pragmatic in that he, understandably, tries to speak for the music industry by advocating more governmental funding while acknowledging the inherent drawbacks of the system (like having to put a dollar value on every music performance and choosing assessment parameters). In any case, while music and translation belong to two different industries with dissimilar practice models, I was greatly inspired by Peacock's work nonetheless.

Of course, with economics comes ethics, the branch of philosophy that deals with what is fair and right and what is not, and ethics has been a topic that has interested economists and translation theorists alike. Law and economics, admittedly, has received more than its fair share of controversy centered on ethics, and even scholars themselves are aware of this. For this reason, I have had to review a handful of works on ethics, both ones with general application and ones that are focused on the ethics of economists, especially business ethics. Ethics being the subject of intense controversy and debate for economists (and their readers alike), the handling of ethics in my research would be a sensitive task, as well as a necessary one.

For my discourse on comparative law and legal translation, two categories that I believe are intricately and intimately intertwined, I, understandably, had to rely on canonical works on comparative law by influential comparative jurists such as Haley and Merryman for insight into legal translation that inevitably occurs in the course of activities as simple as foreign legal text reviewing and as complicated as legal transplantation—either within one legal tradition or across two different ones. The role of comparative law, due to its coverage of legal traditions and how they are grouped together, in legal translation cannot be overemphasized, and yet, surprisingly, there is not much mention of legal translation as a separate category among comparative law scholars, who presumably view translation as nothing but a transient stage between two legal texts, and, because of this, I had to consult papers on specialized translation (legal translation being one genre of specialized

translation) for a panoramic and interactive stance on legal translation and comparative law, such as papers written by Šarčević, Simonnæs and Husa. There are comparatists such as Pierre Legrand who lament the serious lack of mention of legal translation in comparative law, and curious as it is, this of course urged me to consult some of Legrand's papers. Indeed, since legal translation is still a young sub-discipline within an equally young discipline, the weight of scholarly papers recently published by academics focusing on this niche cannot be overstated. In addition, works on other genres of specialized translation (such as technical translation and film translation), while not quite on topic but still related, were fair game for me too as good sources of inspiration.

Last but not least, since there is a slightly empirical aspect to my research, which is presented in Chapter Four in the form of examples from real-life legal translation situations, I have had to refer to examples from real-life legal translation contexts in the EU context and the Canadian (federal) context. Of course, examples are many, and I had to cherry-pick them to the fullest extent possible (talk about efficiency!). . Here, jurilinguistics, a recent subject area initiated by Canadian jurists who realized the urgency of a separate area of research that touches on translation, language and law in a bijural and bilingual context (such as Canada), would be of significance, and I would like to provide it with some more potential frameworks via economics.

### **C. Research Methodology**

In this section of my dissertation, I would like to set my research in the context of its theoretical underpinnings, in which the core of my argument is a claim (that legal translation is a decision process of economic calculation) backed by rigorous logic and reason, which is in turn based on reliable evidence.

This will be my methodological approach: claim backed by reason, which, in turn, is backed by evidence centered on warrants<sup>5</sup>. My key research problem is the origin of the gap in knowledge of economics in translation studies scholarship and how economic methodology can be extended to legal translation for the better, as it has been applied to various research communities.

Since my research is an argumentative one with mostly arguments acting as my theoretical underpinnings, documentary analysis, instead of interviews, observations and questionnaires will dominate the set of methods I adopt and, thus, form my theoretical basis. As is evident in my literature review, I believe that I have sufficient reference on research methodology and design for translation research.

Admittedly, what counts as precise and accurate evidence differs from field to field. As my title suggests, economic methodology will primarily serve as the backbone of my research. As such, to be sure, the translator will be regarded as an economic agent no different than the consumer and the firm operating in a competitive market and fighting for the largest market share possible, who is known to be rational and self-serving in the pursuit of his own agenda and whose real goal is popularity even if his ostensible purpose might well be charity. These will be the two quintessential and fundamental pillars of this research of mine. Then, on the basis of the two indispensable assumptions of human nature (selfishness and rationality), there are some concepts/tenets of economics that I find relevant and applicable, and these include risk, externalities and asymmetry of information et cetera, which are taken for granted by economists but might not necessarily validate warrants<sup>6</sup> shared by all my readers and, thus, will be outlined and illustrated before I go into further details with the specific circumstances in the relevant paragraphs.

There is, of course, more than one research method in use in economics scholarship, and I have chosen a few of them as possible trajectories for my research, and they are game

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<sup>5</sup> By “reference”, I am referring to any commonsensical generalization about the world that everyone considers evident. A warrant serves as the crucial link between a reasons and a claim. *Vide Booth et al.*, 2003, pp. 166-167.

<sup>6</sup> In the context of argumentation, a warrant, or a “principle”, is an element of argument that justifies connecting one’s reasons to a claim, while a reason, which is to be based on evidence, is used to back up a claim. *Vide Booth et al.*, 2003, pp. 114-115. Put another way, the relevance of a reason to a claim is established with a warrant. A typical (and hypothetical) warrant would be “If the ground is wet, then it must have just rained”.

theory, choice theory, cost-and-benefit analysis. On top of that, I will strive to introduce a handful of economic concepts and loci that economists are so familiar with that they have become metrics, or even part of their instinct, for them. By and large, all of them have been more or less tried and tested over the years by economists in a wide array of publications and are, thus, applicable and reliable, even though this does not mean that they are free of controversy. I chose these particular ones for my research on legal translation not just because they are well established and proven, but also because they are likely to be comprehensible and approachable—and maybe amusing too—for the lay mind. On a larger scale, for my reference to conventional economic theories and models, I will take advantage of the teachings of Gary Becker, one of the founders of the Chicago school of economics, who, by virtue of his well-known work *The Economic Approach to Human Behavior*, almost created an “empire” for economics by broadening the range of problems worthy of consideration and evaluation by economists, and for area-specific nuts and bolts, I will be reviewing and using many models and theorems developed by leading figures like Richard Posner and Lawrence Friedman, not to mention John Nash. Also, since a brief contrast between rival economic schools of thought would be helpful, I decided to cite some learned views on Marxist economic thought by academics from all over the globe (such as *Marx for Today*) with simple reference to Marx’s seminal work *Das Kapital*—a work that shook and shocked the entire world.

Then comes the part that concerns law, or, more specifically, comparative law. According to Alan Watson, comparative law as an academic discipline is a very personal subject, giving its proponents great liberty to choose their interests (Watson 1995; 469). This could be an advantage and a disadvantage at the same time in the sense that some scholars of the field are fearing that comparative law is already in the middle of a decline (Hendry in Glanert 94). In fact, this is not entirely true, as one can tell from the magnitude of comparative law literature in recent decades and the offering of a comparative law course at virtually every law school in North America. Moreover, Watson's claim that legal transplants are usually easy to accommodate in any society and that the act of copying the law is more important than the legal rule itself has encountered intense debate and challenge. Blind imitation of legal rules without adapting them to the local legal environment in which they are transplanted will likely lead to the failure of the transplant,

for the comparative approach has revealed that the relationship between law and society may be way more complex than the simple assumption that social conditions determine the law (or vice versa). I do believe that this is the position we must take when conducting research on comparative law or when attempting to introduce/import a foreign law into a new land. The historical method of comparative law being one of the most fundamental approached since the days of German jurist von Savigny, I had to refer to many works on comparative law methodology for inspiration on the status of legal translation as regards comparative law, hoping for new perspectives. As Hendry points out in his book *Law and Language*, we now simply know too much about the diverse peoples of the world to be comfortable with any broad generalization concerning the remote history of mankind (Hendry 128). The historical method, or historicism, dictates that there are observable regularities and similarities in law and the development of law, and if all laws are presented in language, then the law of language must be able to reflect those similarities despite the unreconcilable gaps between languages that often result in untranslatability. In this respect, I realized that the works of Watson, Legrand, Merryman, Zweigert and Kötz, all of whom are listed in my bibliography, as well as the monograph on legal language *Law and Language* written by Harold Berman and, to a lesser extent, *Foreign Law and Comparative Methodology* by Basil Markesinis all provided me with valuable ideas. The significance of the historical school of thought as advocated by von Savigny can be better perceived if their unique insights into history can be somehow linked to the linguistic character of law (Hendry 129). By now, one would probably be able to understand what impact comparative law can have on research on legal language. Of course, as comparative law is an academic endeavour with its own methodology that takes time to acquire, naturally I would just focus on its narrative that concerns legal language and legal translation for my research.

Last but not least, for the record, since I intend for this research project of mine and every claim I make in it to be as open-ended and inclusive as possible, I will seek to build on existing initiatives and approaches widely adopted in translation studies with no intention whatsoever of replacing them. I truly believe that viewing what others before me have said and considered about my topic and/or my specific research questions and giving them all due awe and credit should be part of my research methodology. Therefore, key perspectives

such as the sociological turn of translation studies were a plus—and not a minus—to my research, having provided me with an important—perhaps even a defining—stepping stone in the course of the configuration and conclusion of my own view on legal translation and what economics has to supply it with. Hopefully, what I intend herein will complement and contribute to the achievements made by all my predecessors, translation theorists or otherwise.

Then comes the question of quantifying those values (Say, do we give them dollar values, kilogram values or meter values?) For argument's sake, I had to mostly focus on currency (dollars and euro) and metric units. The difference of another choice would have been minimal, and I do not want to spend too much time delving into a moral confrontation over the “monetization” of translation values—a subject best left for a paper on translation ethics. For the sake of convenience and objectivity, I will just assume that all values are reducible to monetary terms.

#### **D. Preliminary Definitions of Key Terms:**

##### **1. Legal Tradition/Legal System/Legal Family**

Every legal regime must have its own genesis; some happened by chance, and some were simply the product of manipulation of political power. The study of law was so important since the medieval period of Europe that it was, along with theology and medicine, something every citizen seeking to enter public office had to study. Also, every mature regime of law must have had a long history from its remote and primitive origins that eventually led to its inception. The diversity of legal regimes requires that a taxonomy somehow be made of them. As a fast rule, a legal system should be allocated to a circle of legal systems on the basis of some distinctive features common to all of them (Zweigert and Kötz 316). In terms of nomenclature, while most scholars in comparative law use “legal system”<sup>7</sup>, some, Merryman and Haley being two of them, prefer the term “legal

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<sup>7</sup> Please take note that the term *legal system* can be used in more than one way in scholarly legal writing. For instance, in his work, David Friedman refers to tort law and criminal law as two distinct “legal systems”, which, for me, is supposed to denote “areas of law”. For details, *vide* David D. Friedman, *Law's Order*, 2000, p. 7. Moreover, for Paul Campos, legal system seems to mean the judiciary along with the whole body of applicable law that is associated with it, as manifested in “What saves the *legal system* so often is simply scarcity...”. *Vide* Campos *et al.*, *Against the Law*, pp. 25-26.



tradition” (Merryman 2); in addition, Zweigert and Kötz, two heavyweight comparative law scholars, prefer the term “legal family” (Zweigert and Kötz 63 *et seq.*). While the word “tradition” might unduly remind many people of a frigid and gloomy past, for some the pursuit of goods travels over generations within a tradition. The difference in between, which apparently makes a world of difference to some, lies in the fact that, unlike a legal system, which refers categorically to a specific set of norms in effect in a particular jurisdiction, or, in the words of Hart as presented in the classic *The Concept of Law*, a system of rules delimited by a rule of recognition, a legal tradition sounds more like a set of deep-rooted and historically conditioned attitudes towards law, the role of law in society and how the law should be studied and taught. In other words, a legal tradition is a group of legal regimes (institutions) put into a cultural context and viewed from a cultural perspective, which binds together a number of jurisdictions (Merryman *et al.* 1994: 4). Additionally, comparatist scholar Pierre Legrand argues that the notion of “legal tradition” seems to point to a cognitive approach to law that capitalizes on different *mentalités* (literally, “modes of thinking”) of families of jurisdictions that may prove idiosyncratic (Legrand 1997: 45). That said, in my research, though, occasionally I might be found using the three terms (“legal tradition”, “legal system” and “legal family”) interchangeably when citing external sources, making little distinction between them.<sup>8</sup> This is because while a legal tradition, for me, refers to any grouping of legal institutions from any human society according to some common traits and characteristics shared by every individual member in that tradition, and the term “legal system” will refer to the broader legal tradition in this research, the majority of comparative law papers make little distinction between them. Besides, the potential difference among them will be irrelevant for this research. At present, depending on which comparatist is being asked, who could have their own very personal grouping criteria, there could be anywhere from 3 to 12 legal traditions worldwide. Each established legal tradition may have a long history dating all the way back to its inception as an inchoate idea, then through its archaic predecessors before arriving at its origin as a primitive set of rules. Each one of the major legal traditions including common law, civil law, socialist law, Islamic law, just to name a few, by and large has had

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<sup>8</sup> The reason for this is because in comparative law literature, one could easily find just as many scholars using either term, with both terms often showing up interchangeably in the same book, or even within the same chapter.

to follow a path like this. For its part, the British Empire used to exert such great influence over its countless colonies that almost all of them used to and still belong to the common law tradition to this day. Most of Europe (and this includes even Scotland) belongs primarily to the civil law tradition, with the notable exception of Britain and Ireland, Malta and Cyprus<sup>9</sup>—again for obvious reasons, while the European imperialist powers such as Portugal, Spain and France embarked on a series of back-to-back invasions through legal transplantation, resulting in a so-called “legal diaspora”<sup>10</sup> in most parts of Latin America and some parts of Asia and Africa (Benton 2002: 32). At the same time, while many ancient justice systems may have vanished altogether, others, such as the Japanese, Chinese and Hindu systems, have managed to survive, but in the form of a curious concoction with contemporary modern (Western) systems in their respectively unique ways.<sup>11</sup> Even the Islamic tradition, which is a legal tradition based on sacred teachings of the Quran, features more or less a similar pattern—but arguably in a subtle way, even though secular Muslim countries that observe a strict policy of separation of government and religion (such as Turkey and Malaysia) typically have a dual legal system.<sup>12</sup> What this tells us is that regardless of our criteria for grouping legal systems, diversity exists within every legal tradition, and not only will one legal regime look very different from the next, even the same legal regime may look different (without necessarily switching legal traditions) over time.

Finally, since the contrast between the civil law tradition and the common law tradition is of particular interest not just because the two are highly influential worldwide and followed

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<sup>9</sup> Owing to their unique historical background, Malta and Cyprus belong to a hybrid legal tradition, which has both common law and civil law features. This is hardly surprising, since, in Merryman’s words, there are many important nations that cannot be included in any one of his three major legal traditions: civil law, common law and socialist law. *Vide* Merryman, 1985, p. 5.

<sup>10</sup> By coincidence maybe, the word *diaspora* originally meant a demographic situation where members of a particular community get spread out into different locations through the travels and relocation of its original community members usually by migration, voluntary and involuntary. Ultimately, of course, their language and/or culture will travel with them forming a diaspora. Typical examples of diaspora include the Irish diaspora immediately following the Potato Famine and the systematic migration of the Jewry all over the world. It, of course, may be used for law, as the case in point here, metaphorically to mean the diffusion of a legal order or an entire legal system to new locations. For details, see Benton, 2002, pp. 31 *et seq.*

<sup>11</sup> Asian countries like China, India and Japan form interesting examples in that each features a peculiar combination of a local legal tradition (usually quite sophisticated), other native legal influences along with a western legal tradition (common law or civil law). Their examples have, in fact, provided comparative law scholars with inspiration on how their subject field can be further diversified.

<sup>12</sup> In a dual legal system, mutual tolerance and smooth coordination, of course, would be absolutely necessary and yet hard to achieve, as we have witnessed in the handling of family law cases in Indonesia.

by most industrialized and technologically advanced countries, but also because every country whose legal translation status I am studying follows one of these two legal traditions, my research will be primarily devoted to common law and civil law. Even Pierre Legrand, who, regardless of his position on the issue, argues against a unified code for Europe, focuses solely on civil law and common law in his 1997 paper *Against a European Civil Code* with little mention of the Islamic legal tradition. By the way, as legal historians have discovered, despite their bifurcation, there is nonetheless a common intellectual and historical heritage shared by the two legal traditions that link them together; some scholars, in light of the countless common features they share, have even gone as far as to class the two of them together as a “Euro-American” group (Merryman *et al.* 26).<sup>13</sup> To make a long story short, the key distinction between the two systems lies in the sources of law on which they rely. While the common law tradition affords prior decided cases (i.e., precedents) very high and prestigious authority (even though there is some variation in degree of rigidity among individual jurisdictions within this legal tradition) (Kempin 2001: 14-15), civil law is largely oriented towards a practice of codification of laws, a comprehensive enactment of and adherence to all laws, mostly written, of the jurisdiction, since precedents, while never disregarded altogether, do not have absolute binding authority on judges. In addition, civil law courts often look to the writings of scholars for inspiration with the interpretation of codes, which is quite rare, if not outright banned, in a common law jurisdiction (Ibid.). As a side note, there are voices across academia claiming that there will be a greater and greater harmonization of common law and civil law because of the integration of the EU (Merryman *et al.* 30), where the uniformity of law has been thought to provide practical advantages. Of course, as we know, reality does not always conform to theory, and, if anything, at this point, this dream has yet to “come true”, not to mention the potential but unpredictable implications that Brexit will entail.<sup>14</sup>

Please take note, though, that my choice of legal traditions in no way suggests that legal traditions not covered in this research, such as the Islamic legal tradition and the socialist

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<sup>13</sup> Some comparative law scholars have gone one step further by including socialist law in into the family of a greater “western” legal tradition alongside common law and civil law. Of course, the desirability and justifiability of this position would be off the topic for this research. For details, *vide* Merryman *et al.* p. 26.

<sup>14</sup> Comparative law scholars have written on whether a unified and harmonized civil code would necessary, or even possible, across the European Union over the past few decades or so, and apparently, the mainstream idea sides with the negative. *Vide* Pierre Legrand, 1997, p. 44.

tradition, are of no importance; quite to the contrary, Islamic law has, for one, made considerable contribution to the development of legal science in many respects over the centuries. In fact, Islamic law, as interpreted by juristic writings by highly influential Islamic scholars, is quite possibly the most important non-Western legal tradition today that has survived the brutal passage of time (Kempin 14). Additionally, because of expansionism, imperial, colonial or otherwise, a trend of mutual tolerance and mutual inspiration appears to be in the making, and this provides rich soil for legal language and legal translation. One need not look too far beyond Roman contract law to realize how enormous the impact of a legal tradition on legal change in a particular place could be, and also how much contribution something like legal change in one locale can bring about for the legal tradition in general that the local jurisdiction belongs to. A change in law in the form of an introduction of a non-local institution or mechanism into the local body of laws will involve legal language and the use of it, and, without a doubt, legal translation will come into play in this context.

## 2. Comparative Law

For Alan Watson at least, comparative law is a very “personal” subject in that it grants its proponents considerable latitude to choose their research interests (Watson 1995: 469). Aimed at exploring the similarities and differences among legal systems around the world, comparative law, which has proven necessary and useful today, has a longstanding tradition as an important branch of legal scholarship in Europe. And just what is comparative law? Is it a law or a field of research or what? On the surface, the term seems to suggest an “intellectual activity with law as its object and comparison as its process” (Zweigert and Kötz: 2), but, as we all know, such a definition would be far too superficial. Comparative law, or the “comparative study of law”, or even “comparative legal studies” as some prefer, is the specific academic endeavour under legal sciences that aims to understand a foreign (or at least a non-native) legal system or legal institution for the purpose of comparison and, eventually, improvement. This one seems slightly more informative. As if the definition of it were not complicated enough, while there is no decisive consensus as to the principle, method, problem identification, argumentation construction or standard of evidence, the

historical and political fact of differentiation of laws across nations and jurisdictions worldwide provides comparative law with its vital justification (Legrand in Clark 2007: 221).

Why study comparative law at all? For the idealist legal scholar Harold Berman, comparative law is a platform where students and academics master another legal language and another legal culture for the sake of world peace (Berman: 17). At the same time, surprisingly, for others, the study of comparative law has a great deal to do with how comparative law as it is today came into being around 1900, when French scholars Lambert and Saleilles founded a research society for comparative law with the creation of a world law (or “common” law) as its long-term goal (Zweigert and Kötz: 2-3). This was also when the First International Congress of Comparative Law was held. Comparative law, however, being a discipline that incorporates the act of comparison into its name, its methodology is destined to be like no others. At a more mundane level, there are arguably three straightforward reasons for studying comparative law: to deprovincialize law students and legal professionals; to prepare future lawyers and judges for cases involving foreign law and, last but not least, to view foreign legal systems as a source of ideas (Merryman 1994: 1). Sometimes, people are simply so used to their own ways of life (and this includes their legal system) that they only notice their imperfections by means of comparison, which usually does not happen until something goes wrong unexpectedly. True, it has as its province the operating institution and the law in action, but its end goes far beyond the pursuit of such knowledge (Glendon *et al.* 9). Comparative law, as it is known today, had its origins in law reform in Europe in the 19<sup>th</sup> century<sup>15</sup>, and, today, few background studies of legislation projects are undertaken without at least some comparative study and research. Discussions of the purpose of comparative law often reflect a stark distinction between the practical and the scientific aspects of comparative law. In short, the history of comparative law could be considered “part of the history of ideas” (Zweigert and Kötz 48).

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<sup>15</sup> This, again, is debatable, as comparative law scholar Charles Donahue, for one, argues in his paper that traces of what is known as comparative law today can be found as far back as ancient Greece, through the Middle Ages and into contemporary times. *Vide* Donahue in Reimann and Zimmermann, 2006, pp. 3-4.

In another sense, comparative law can be treated as a method of investigation targeting every branch of law imaginable.<sup>16</sup> This can be verified by the fact that in the compendium *The Oxford Handbook of Comparative Law*, comparative law can take many approaches that require the use of different methods (e.g., *The Functional Method of Comparative Law*)<sup>17</sup>, and, as well, the status of comparative law in a range of various subject areas (e.g., sales law<sup>18</sup> and antitrust law<sup>19</sup>), where different law categories are examined via the methodology of comparative law. Comparatists are interested in adding meaning to a description of one aspect of a foreign legal tradition by contrasting it with a comparable aspect of another legal tradition (usually the comparatist's), and there are more than one ways to achieve this. Berman, for one, even believed in empirical research on foreign legal traditions through fieldwork out of his belief that a comparative legal scholar not only should understand the law in books but also the law in action (Berman 18). Some have accused comparative law's approach of being so static as to hinder scholars' ability to adapt to new challenges (Pizzolla 121), whereas René Cassin, one of the drafters of the Universal Declaration of Human Rights (UDHR), maintained that comparative law was a subject that true proponents of human rights ought to be familiar with (Glendon *et al.* 5). In short, comparative law's value lies in the fact that it provides scholars and jurists alike with insights that would otherwise be impossible if their vision remained entirely within the confines of their own nation's law of the day.<sup>20</sup> Perhaps this is why comparative law is itself an evolving field, having formed an interdisciplinary undertaking with economics called "comparative law and economics" that is "located at the frontiers of contemporary legal research" (Mattei and Monti: 1).

Nonetheless, this in no way suggests that comparative law has never encountered any challenges; quite to the contrary actually, it has seen its fair share of doubts and challenges as to its status within legal science. In fact, Merryman, one of the editors of the book on

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<sup>16</sup> This, however, does not suggest that there have been no subfields or branched of law left out. Financial law, for one, according to Pizzolla, is a field of research largely ignored by much comparative law literature, and some recent developments notwithstanding, the role of comparative law *per se* remains incredibly limited. *Vide* Pizzolla, p. 118.

<sup>17</sup> *Vide* Reimann and Zimmermann, 2006, pp. 339 *et seq.*

<sup>18</sup> *Ibid.*, pp. 937 *et seq.*

<sup>19</sup> *Ibid.*, pp. 1193 *et seq.*

<sup>20</sup> Of course, the comparison conducted in comparative law could either be diachronic (i.e., a comparison of land law in the Victorian age and modern-day England) or synchronic (i.e., a comparison between contemporary family law of England and that of Ireland). Both will be equally comparative.

comparative law *The Civil Law Tradition*, says it very clearly as his opening statement that most comparative law, as it is taught and discussed in law schools, could be more accurately called “foreign law” because it is more about the description of foreign legal systems (Merryman 1994: 1). This made comparative law too simple and reductive even to comparatists. He then continues on to assert that while true comparative law does exist, it is only incidentally comparative (Ibid.). Moreover, comparative law is more than just about importing and transplanting legal institutions; in this regard, scholars have repeatedly stressed that importing rules and seeming “solutions” from abroad may not work due to, among other things, a change in context, time and space, thereby requesting a more context-oriented approach (Van Hoecke 3). To this Merryman, in his dialogue with Pierre Legrand, added that mere comparison based on descriptions of rules of law should probably be the most trivial activity (Legrand 1999: 4). Instead, he argues that non-rule-based research should be a “larger concern” (Ibid.), which requires that the all-too-familiar rule-comparison paradigm be forgone (Ibid. 5).

Every legal tradition and jurisdiction comes with its strengths and weaknesses, and comparatists try to make up for the weaknesses they see in one tradition by drawing on the strengths of another. People in different places might choose to do things differently, and yet they still arrive at the same results with their lives carrying on happily—most of the time. Sure enough, investigation and observation of how another legal system deals with problems shared by all will help one design one’s own research, formulate hypotheses and test conclusions. Comparative law is not a domain reserved for the select few, but one that can and should be referred to by all law teachers when teaching their own topics of national law (Markesinis 2). Yet this task of “looking beyond one’s home system” might not be as simple as it sounds because legal norms and rules are, for the most part, deeply rooted in the specific cultural, social and political background often reflecting underlying local values of the day in the jurisdiction (i.e., prevalent temporal and spatial values) that shaped the legal system, even though many laws are found to have survived the socio-economic conditions that gave birth to them in the first place. Moreover, even if a legal document/piece of legislation is fully understood at a later time by an “outsider” (i.e., someone not native to the jurisdiction but who knows the local language nonetheless), they

might still find it difficult to translate it into another language (even into their native language), since one legal concept from one legal tradition does not always readily have an exact counterpart or “equivalent” in another legal tradition (e.g., there is no “reasonable doubt” in civil law and nor is there an *eikozakuen* (Japanese: 永小作權, literally *emphyteusis*, as set forth in the Japanese Civil Code arts. 270-279) in common law<sup>21</sup>. The translation into English or Russian of this legal term, which a comparative research on, say, land ownership, would certainly be problematic. Granted, comparative law, to a certain extent, thrives on the differences and similarities between legal systems in relation to some aspect or parameter, and this will, in turn, help us (re-)evaluate our own legal institutions. However, at the same time, comparative law is by no means just about comparing two (or more) laws or legal documents—or even two giant legal systems, as the term itself may suggest, and, also, sophisticated comparatists with some academic conscience have long foregone tedious discussions of superiority and inferiority among the legal systems being studied (Merryman *et al.* 4). In this regard, we must approach comparative law, just like many other undertakings of research across the social sciences, with two key concepts in mind: function and context (Glendon *et al.* 9). More specifically, there is no way for anyone to compare legal rules or legal institutions without first situating them in their respective original and authentic legal, historical and cultural context, and any attempt to compare rules, doctrines and institutions on paper taking them out of context will end up in vain (Ibid.). To boot, all legal concepts must be placed on a scale, examined and compared against each other not in the abstract but on the basis of the function they intend to fulfill (Reimann and Zimmermann 245); in other words, the starting point of comparative analysis should not be the rules that are visible on the outside, but the social/societal problems behind those rules (Ibid. 246). This approach, known as the functionalist approach<sup>22</sup>, is arguably one of the greatest contributions that comparative law has made to legal science,

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<sup>21</sup> A remotely similar institution, copyhold, exists in common law, but the two are not similar enough to be considered identical to each other. Some consider it a “perpetual lease”.

<sup>22</sup> The functionalist approach to comparative law was first introduced by Ernst Rabel in the 1920s. In addition, Hans Vermeer’s highly praised *skopos* theory, which argues that the function of the target text for the target culture comes before anything, was heavily influenced by functionalism. Needless to say, a thorough investigation of the functionalist approach to comparative law will require an in-depth discourse on functionalism, structuralism and Marxism, along with a handful of other relevant ideologies, for a context-based and panoramic view of all approaches concerned in order for the comparison itself to make sense. Such investigation is, of course, best left for another study.



and it is, as some scholars claim, what has made comparative law an inherently interdisciplinary field (Ibid. 11). Also, training in comparative law is vital to a harmonization project of laws within supranational bodies such as the EU, where dozens of different political and social mechanisms come into play simultaneously thereby necessitating a streamlined legal institution for the well-being of the collective. No wonder some comparatists believe that while comparative law is concerned with the intersection and interaction between systems, it helps us ascertain the true nature of law by demonstrating how law evolves and changes, and, thus, in this sense, comparative law can be considered a branch of jurisprudence (Meryman *et al.* 46).

As a preliminary remark for this paragraph, one should be able to tell when comparing legal systems or legal regimes that the foreign language component would make things complex and difficult (again, what context do we put the concepts *Zumutbarkeit* and *eikozakuen* in when translating, comparing and postulating?). What this means for us is the role that language and legal translation can play for comparative law, or more broadly, the role that law plays in general in such context, and as far as comparative law in the context of legal translation is concerned, I will be viewing both legal traditions (common law and civil law) on an equal footing. The difference between the two legal traditions is, in a way and according to some, blurring, as more and more legal discourse in Anglo-American jurisdictions is revolving around enacted law—statutes, regulations and constitutional provisions (Smith 59). In passing, comparative law's capacity as an area/subfield within law does not come without controversy, and its status is sometimes harshly contested (Hendry in Glanert 88), with a good share of controversy tying back into its functions, goals, means and methodology.

Comparative law, admittedly, has evolved considerably over the past few decades and across the globe—from Europe to North American and then onto Asia (Reimann and Zimmermann 246). As history has shown, comparative law will matter more and more in a globalized context where countries are grouping themselves together economically, politically and even militarily. Developing countries are already busy borrowing ideas from other countries, while mature economies like China and Japan are making their corporation, commercial and investment laws available in English (as well as in a number of other languages) to attract foreign investors (Wolff in Malmkjær and Windle: 232). In any case, it

is my belief that comparative law, and comparative analysis in general, can serve as a heuristic method for all sorts of intellectual undertakings, and my appreciation for it does not end with my research. Now, let's have a look in detail at the two legal traditions that the "customs of the European peoples have been worked up into as intellectual systems" (Glendon *et al.*14), starting with common law.

### 3. Common Law Tradition

Common law is the legal tradition that is prevalent in Britain and virtually all its former colonies—i.e., most of the English-speaking world, and in the USA in particular, which gave common law its alternative title: Anglo-American law. Originating in the archaic legal system of the Anglo-Saxons with remote origins in the laws of the Germanic tribes that settled in modern-day England sometime in the first millennium, common law has matured on a separate path from civil law for centuries, though in no way does this mean that it shares absolutely no common traits with Roman law or ecclesiastical law (Kempin 2-3). The date commonly cited as the birth of the common law tradition is 1060 CE, which was when the Normans conquered England by defeating the defending natives at Hastings. Thus, the common law tradition is but slightly more than 900 years old, much younger than the civil law tradition (Merryman 1985: 4). Over generations, this ancient body of laws gradually became embodied in a wide variety of judicial decisions, and with the passage of time, common law started to mean judge-made law as opposed to statutory law in some contexts. As a result of the rapid expansion of the British Empire in the days of colonialism, common law got widely distributed and transplanted in many places such as Ireland (which incorporated all British common law and statutory law into its legal system in 1922), most of Canada, South Africa and Australia, just to name a few. In fact, according to jurists, historically speaking, Ireland has never had an indigenous body of law that could withstand the vehement tides of time, and, therefore, it had to adopt common law, the law regime that became common in all of England and Wales after the Norman Conquest, as its predominant source of law (Doolan 2). Today, according to modest estimates, nearly a third of the world's population live in places where the law has been more or less strongly shaped by common law (Zweigert and Kötz 227). As expected, now as then, common law

remains robust as ever, never ceasing to exert a strong influence on the legal institutions of many jurisdictions.

As a legal regime, common law relies heavily on previously decided cases, terminologically called “precedents”, for their holdings (*ratio decidendi*), the doctrine of *stare decisis* being at the very heart of this tradition. Yet it would be wrong to jump to the conclusion that there is nothing but the following of precedents in common law. Basically, the doctrine dictates that a judge must follow the law as set forth in prior cases decided by the highest court of the jurisdiction the judge belongs to, as long as the holding, the “gist”, the “spirit” or, more professionally, the *ratio decidendi* derived from those cases are logically significant for their ruling of the current case, is reasonable and is appropriate to contemporary circumstances (Kempin 14-15).<sup>23</sup> Intuitively, for the sake of certainty, the rule of *stare decisis* makes perfect sense, and, by the way, it is this element of common law that gave rise to the thesis of the efficiency of common law (which does not come without debate) (Noreau 131). However, truth be told, it is precisely for this reason that the common law tradition may appear unsystematic, undeveloped or even uncivilized to a civil law jurist or a socialist law scholar.

Admittedly, this view is somewhat biased and tenuous, and the resolution of it will require a deep look into the history of common law. Even though they brought little written law with them to England, the Norman conquerors of 1066, as descendants of the Scandinavian conquerors of western France, conquered a country that had already been enjoying a functional system of government. They managed to transform existing Anglo-Saxon law, and the resulting law, Norman law, was not radically dissimilar from Anglo-Saxon law (Kempin 7). Soon after their victory in the Battle of Hastings, the Normans were quick to centralize the government and the administration of justice. One thing they did to this effect was recreate the Great Council of Magna Curia. Anglo-Saxon law was the custom, and the custom was law. The newly established body of substantive law was supposed to be applicable to all Englishmen and hence the name “common law”.

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<sup>23</sup> In addition to common law, most common law jurisdictions have equity law as a complementary—yet separate—body of law, which is just as important for the rule of law. However, in my research, I will not be giving equity much weight, since it is mostly unwritten and, at least for technical purposes, could be considered an institution alongside common law.

Another defining feature of the common law tradition is the existence of equity as a separate system of justice. Equity (or equity law as opposed to common law<sup>24</sup>) was developed by courts of chancery and the Star Chamber, instead of common law courts, as a counterbalancing measure to common law. As a complementary and separate system of justice, equity has both substantive and procedural aspects to it. Many legal institutions were actually developed specifically by equity law, the trust being a notable example, and besides equity also provides the injured party with more remedies (i.e., equitable remedies such as restitution, specific performance and injunction) than common law, which has nothing other than damages available to the aggrieved party against the defaulting (injuring) party. Further, in cases where common law and equity contradict each other, which they are bound to, equity doctrine would prevail. While equity was supposed to supply the defects of common law, it has remained mostly fragmentary because it is very difficult to establish a general theory of equity (Doolan 225). For centuries, the two types of courts existed side by side in Britain. In 1875, the British Parliament replaced old courts of common law and equity with a unified high court administering both common law and equity, thereby stopping tensions between the two systems of justice. Today, in many US jurisdictions, such as the federal, New York and California, the distinction between court of law and court of equity no longer exists with all courts having been authorized to administer both types of justice. A few, such as New Jersey and Delaware, have entirely separate courts/divisions for handling cases at law and cases in equity. The distinction may be somewhat unnecessary now, but whatever the case, common law and equity still feature very different and separate principles even if they are handled by the same court (Kempin 19).<sup>25</sup>

Of course, the jury, as a fact-finding body, whether a petit jury or a grand jury, is another identifying trait of common law.<sup>26</sup> The jury system was first imported into Britain after the

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<sup>24</sup> There are at least two shades of meaning to the term “common law”. Caution should be used here as this usage of *common law* is decidedly different from that as featured in one of my sub-chapter titles.

<sup>25</sup> The distinction may be more pronounced in civil cases that involve trial by jury because jury trial is only guaranteed by the US constitution for civil cases under common law principles. No jury is hired today in cases involving the application of equitable principles.

<sup>26</sup> The institution of the jury does not come without controversy. For one thing, inasmuch as law intersects language, a jury would complicate a trial or any legal proceeding whenever there is non-native speakers or ethnic minorities involved who may or may not speak the local language at all. Besides, the education of

Norman Conquest, and its functions have changed considerably over the centuries. In the US, facts, if not agreed on by the parties, may be found—and founded— by a jury or a judge, and jury trial is a fundamental right guaranteed by Amendment VI to the Constitution. There are some exceptions to this though: misdemeanor cases, summary proceedings and cases involving equity law. On the other hand, in Britain, while all cases tried in the Crown Court at first instance must be tried by a jury, trial by jury in the civil justice system is now almost unheard-of (Elliott and Quinn 123).

The principal differences between the two legal traditions, which have been studied extensively by comparative law scholars, are many, and they include the sources of law (Merryman 19 *et seq.*), the philosophy for codification (Ibid. 26 *et seq.*), the status of judges (lawmaker vs. public servant or *fonctionnaire*) (Merryman 34-35), certainty vs. equity (Ibid. 48 *et seq.*), the status of academics and their opinions (Ibid. 56 *et seq.*), law (as a field of research) vs. legal science (*Rechtswissenschaft*) (Ibid. 61 *et seq.*), the classification (or ordering) of law (Ibid. 68 *et seq.*), the division of jurisdiction (the court system and its hierarchy) (Ibid. 85 *et seq.*), the legal profession (Ibid. 101 *et seq.*)...etc. As a token of consolation maybe, some scholars claim that the two legal traditions differ less in detail than in approach (Fitzgerald and Wright: 21); in more specific terms, theory and practice, logic and experience, rights and remedies, abstractness and concreteness, generality and particularity are the key dichotomies that, taken as a whole, best describe the difference in them, and yet, both legal traditions have one deep-seated thing in common to the core: the intention to resolve disputes authoritatively centered on bedrock principles like certainty, fairness and justice (Ibid. 22). Of course, this brief summary is far from complete, and a thorough investigation of the real differences between the two legal traditions will require a much closer look at each one of these categories. Due to space constraints, something like this would be best left for another research project.

Despite the fundamental key criteria that delineate common law from other legal traditions, common law jurisdictions, to the surprise of many people not familiar with law, do have statutes that they rely on on top of prior court cases. As a matter of fact, a US state typically

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jurors is extremely technical and formidable, as there is usually little to no training for jury service in most jurisdictions. *Vide* Eades in Gibbons, 1994, p. 253.

would have just as much, if not even more, written legislation in effect as a European, Latin American or Asian country (Merryman 1985: 26). Furthermore, in the US, some states even go as far as to compile their statutes into “codes” (e.g., notably, the *California Code of Civil Procedure* and the *California Civil Code*) (by the way, the US state of California probably has more codes than any civil law country, but California, as we know it, is no civil law jurisdiction).<sup>27</sup> In Britain, statutes come in the form of acts of Parliament (such as the *Animal Welfare Act 2006* and the *Unfair Contract Terms Act 1977*), and there are so many of them. Thus, Merryman dismisses the amount of written legislation serving as a valid criterion for differentiating the two legal traditions very strongly (Ibid.). However, caution should be used here, as these codes are substantially different from civil law codes; in a way, common law courts are allowed to interpret these statutes and codes, but the rules vary greatly by jurisdiction. There is much academic debate on this. In any case, in common law, as a rule of thumb, whenever a statute is passed, it attains a canonical form but without any elaborate justificatory opinion (Smith 59). In addition, the judge or the jurist typically would be inclined to refrain from dismissing whole sections of a statute in the way he would a judicial decision as dicta (Ibid.). Essentially, if codification is considered not a form of making law but a means of expressing an ideology, then it would make more sense to liken civil law to a legal tradition underscored by codification. Despite the resemblance shared by these common law codes and codes of civil law jurisdictions, they are not predicated on the same ideology, and nor do they reflect the same cultural reality (Merryman 32). Moreover, common law codes do not pretend to be complete, and, as such, judges are under no obligation to seek for the basis, or the *ratio decidendi* for deciding a case within the confines of any code. This is because, most likely, such codes do not amount to total repudiation of the past, for they do not purport to override any prior law, but instead they are just meant to supplement it (Ibid.). Whenever a code or a provision of a code is in apparent conflict with a widely accepted or highly established tenet of common law, the code or provision in question will be interpreted in such a way that no conflict ensues (Ibid.). In any case, the bottom line is that statutes are not supposed

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<sup>27</sup> The overwhelming amount of codification existing in the US hitherto since its colonial period, according to legal historian Lawrence Friedman, probably has to do with American history. Before the Revolution, across the colonies, codes were considered systematic and reliable bodies of law, while common law simply seemed too shapeless and intangible. Common law, in his words, was simply not suitable for export from Britain in those days. *Vide* Friedman, 2005, pp. 50-51.

to change the common law, and some scholars consider this one of the presumptions that are implied in all legislation, amid other presumptions like vested rights not to be interfered with and statutes not to affect the monarch (Elliott and Quinn 31). By contrast, legislation under civil law is expected to be complete, stable and systematic by means of codification, and thus the judge's power is restricted to the interpretation and application of the law for the sake of legal certainty.<sup>28</sup>

#### 4. Civil Law Tradition

Of the two major legal traditions, the Romano-Germanic one is the older and the more influential one, and it is also probably more widely distributed in terms of country-jurisdiction count. In addition, public international law has been heavily shaped by civil law (Glendon *et al.* 15; Merryman 1985: 3). Contrary to common belief, the civil law tradition, instead of being a homogeneous monolith of legal institutions, is actually a composite of five distinct sub-traditions: Roman civil law, canon law, commercial law, the revolution and legal science (Merryman 1985: 6). For starters, the tradition of civil law is characterized by a particular interaction in its early formative period among Roman law, canon law, local customs and international commercial law, which ultimately led to the collapse of feudalism and the rise of nation states (Glendon *et al.* 16). The oldest sub-tradition is traceable to the Justinian Code of the 6<sup>th</sup> century, which includes topics such as the law of persons, the family, inheritance, property, torts, unjust enrichment and contracts, as well as, most importantly, the remedies through which rights and interests falling into these categories are judicially protected (Merryman 1985: 6). Over the years, the first three books of the Institute of Justinian (*Of Persons*, *Of Things* and *Of Obligations*) and all major civil codes promulgated in modern times have remained relatively stable, and the substantive area they cover is what a civil lawyer typically means by “civil law” (Ibid.). Civil law subsequently accumulated so much momentum that it may now be difficult for

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<sup>28</sup> In regard to the status and function of the civil law judge, some scholars cannot disagree more. A civil law judge does have to interpret the law from time to time, since they often find themselves stuck in a quagmire where the only seemingly applicable legislation is too general to be useful. And since judges are not allowed to refuse to hear and decide a case before them simply because they think that the law is vague or apparently absent, in the end they have to improvise by “deducting” or “inferring” from current legislation passed by the legislature. This is nonetheless law-making activity. *Vide* Merryman, 1985, p. 83.

common law jurists to resign themselves to the hard fact that the civil law tradition is actually older, more widely distributed and, in some ways, more influential than common law. To boot, quite a few comparatist scholars even consider civil law superior to common law (Ibid. 3).

The civil law tradition can be traced all the way back to Roman law, whose earliest codification is believed to be the enactment of the Twelve Tables around the 5<sup>th</sup> century BCE. Since then, Roman law has been the most inspiring and most simulated system in the West, and the law of contract, in turn, became the most original element of that system and the most admired too (Watson 4). It was around the 3<sup>rd</sup> century, during the Republic, that a class of men, known as “Jurisconsults”, appeared as the first ones ever to make the practice of law their specialty (Ibid. 17). Eventually, principles developed by the Jurisconsults were taught and expounded in treatises, all in a distinctive style, and little by little Roman law evolved (Ibid.). Following the disintegration of Rome, Roman law lost its universal applicability little by little in the political sense, but civil law never stopped receiving its modern impetus thanks largely to systematic codification implemented by Napoleon Bonaparte in the early 19<sup>th</sup> century, with the Napoleon Civil Code possibly being his greatest achievement—greater than any of his military victories. In it, a few innovations such as divorce by mutual consent (as opposed to a breakdown of marriage) are attributable to Napoleon (Glendon *et al.* 36). This codified private law has deservedly earn its name as the greatest model for all codes of private law within the civil law legal family (Zweigert and Kötz 76). Civil law was subsequently inherited by most of continental Europe, and then, by way of colonialization under imperialism, it was further imposed on the legal regimes in many places across the Americas, Asia and Africa, most notably by the major colonial powers like France, Spain, Portugal, the Netherlands and, to a lesser extent, Germany, and then, finally, Japan. Hence, it is praised by some as the “oldest, most widely distributed and most influential legal tradition of all” (Merryman 1985: 5). Today, civil law has left its marks—and deep and heavy ones for that matter—in most of Europe, all of Latin America, many parts across Africa and Asia, and a few subtle ones in a few enclaves (notably, Louisiana, Quebec, Scotland and Puerto Rico) scattered throughout the common



law world, as well as in arguably every socialist country (Cuba, the Soviet Union and maybe even China) before they became socialist/communist.<sup>29</sup>

Presumably, the predominant identifying feature of civil law is the primacy of written laws, or statutes. However, as described a few pages back, this claim is incomplete at best and misleading at worst. In the opinion of Merryman, this is far from a veritable criterion, and there are many counterexamples to show this. As a case in point, both Greece and Hungary were civil law countries decades before either one of them enacted their first civil code (Merryman 26), while, on the other hand, the *Uniform Commercial Code* (UCC) was adopted by all 50 states of the USA (this even includes Louisiana, though with a few provisional reservations) and most of its territories plus the District of Columbia, and there is not a doubt that the vast majority of US states are common law jurisdictions. On the face of it, all these codes look highly similar. In other words, while the practice of codification is an important metric for the classification of a jurisdiction, it should not be the sole metric. Again, a better approach would be through the underlying ideology (emphasis mine) (Merryman 27). Analytically, as regards the conception of what a code is and what purposes it should serve in the legal process, the two legal traditions are very different, and there are two entirely different ideologies of codification at work between the two legal traditions (Ibid.). In a civil law country, such as Germany, France or Japan, when a code is enacted and promulgated, it is supposed to establish a new legal order that feeds into the greater political climate (or *mise-en-scène*), be it nationalism, statism, militarism or mercantilism (Ibid. 28). Also, in compliance with the principle of separation of powers, the code had to be clear and free of any intervention from the judge or the judiciary at large. This is in fact even more pronounced in the legislative history of Germany's civil code, which was meant to incorporate some historical and native features and principles of Germany of the day. Both the German civil code and the French civil code (as well as the subsequent Japanese civil code, which was enacted in two stages, first in 1896 and then in

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<sup>29</sup> By the way, in consequence, given the close link between socialist law and civil law, an understanding of the civil law tradition is essential to a clear understanding of socialist law. This is particularly true of former socialist countries that are in rapid transition like China and the Eastern Bloc countries, and this was never by chance. Of course, a discourse on socialist law, however intriguing and meaningful, will fall beyond the scope of this research. For details, please refer to Merryman, 1985, p. 3.

1898) served a very important political purpose: the unification and fortification of a newly established monolithic nation state (Ibid. 32).

## 5. Multi-/Bilingualism

The Genesis story of the Tower of Babel is probably the best-known story on the use of more than one language, even though it did not have a happy ending for the human race; instead, it resulted in a divine punishment in the form of a potpourri of different languages that were not mutually intelligible. While this Biblical story does not come with a happy ending, the truth about bi-/multilingualism is that in most cases, it happens and persists through contact and necessity (Edwards 39). Whatever one's stance on divine power is, one thing is for sure: people need a common language for that sense of belonging, and one of the easiest ways for people to signal their wish to be close to or different from those around them is through their choice of language(s), and the use of a particular language is often a token of membership in a distinct group—political, religious, ethnic or occupational. Once groups and clans based on language are formed, there will inevitably be barriers, which, in turn, necessitate the crossing of language barriers among language groups (Ibid.). In the most basic sense, multilingualism categorically refers to (from the perspective of a jurisdiction) the status of at least two languages or two language codes<sup>30</sup> being in regular and extensive use in a given geographic location or by an individual, or (from the perspective of the individual speaker) the ability to speak—at some level—more than one language (Edwards 33). As sociolinguists acknowledge, a great deal of effort has been devoted to the investigation of social aggregates characterized by the use by some or all of its members of two or more languages—a conspicuous case of multilingualism (Coulmas in Coulmas 1998: 7), and yet, true, while a place full of multilingual people is itself considered multilingual, this is rarely the case (Edwards 55). Research on language varieties such as dialect and jargon is a typical outcome of this. Additionally, information

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<sup>30</sup> Personally, I prefer the term *code* in this context to mean any language form, be it a dialect, language, patois, creole or any variety. I believe it should be as comprehensive as possible in scope. As a matter of fact, the term *code* is widely used in linguistics scholarship, as in “code-switching”. Some sociolinguists, Natalie Schilling-Estes being one of them, disagree; according to her, if it is only shifts into and out of language varieties (typically register, dialect, genre) of the same human language involved, then it should be considered a style shift. *Vide* Schilling-Estes in Chambers *et al.*, pp. 375-376.

on how widespread and accepted bi-/multilingualism is in a country or any jurisdiction may not necessarily be reliable, as little assessment has ever been carried out in a systematic way of language proficiency in more than one language (say, English and French in Canada), and official estimates and statistics are most likely released based on self-reported claims (Wardhaugh 350). In brief, the outcome from a survey like this largely depends on one's specific standpoint and the criteria that come with it.

First of all, in contrast to monolingualism, the ability to use or the practice of using only one language, bi-/multilingualism, the ability to speak more than one language/variety, is considered a must in some places. It is a policy usually established by a government or a similar body with considerable power, and hence, it would be most likely highly political in nature. Second of all, it may refer to something at the institutional level such as a government-level policy of allowing, sponsoring or even encouraging the simultaneous use of more than one language/variety. Contrary to common belief, with at least half of the world's population bilingual, bilingualism around the world is more common than most people think; it is a "global phenomenon" (Edwards 33). What is relatively rare and idealistic is ambi-bilingualism, the capability and aptitude to function equally well in two or more languages/varieties across a wide range of domains (Moradi 107). In reality, individuals (who are otherwise bi-/multilingual) who illustrate greater or lesser degrees of two or more languages with varying degrees of fluency and proficiency (and being more dominant in one than the other) are more of the rule than the exception. This is especially true if one of those languages that the bilingual person claims to speak happens to be an L2, and history is generous with examples of this. Since the early days of the Norman Conquest, the nobility and the upper class, as well as people across the legal profession would typically be fluent in English and French, and sometimes in Latin too (Mellinkoff 1963: 95). But in no way does this suggest that the jurist back then would be able to speak all three languages with the same degree of proficiency and ease. As demonstrated by Daniel Langelier, a French-Canadian who has lived and worked in the US for decades, there are still certain areas of conversation where he would feel "a lot more comfortable in English than in French" (Simpson 117), and even when he speaks to friends in Montreal about business or law when he travels back there, they would automatically switch to

English (Ibid.). Besides, the chances of his grandchildren speaking any French at all are “next to nil” (Ibid.).

Research by sociolinguists has revealed that multi-/bilingualism may exist in a variety of forms, including diaspora, diglossia, heteroglossia, as well as the language situation in Paraguay where Guaraní co-exists with Spanish, both being official languages (Schiffman in Coulmas 210). Worldwide, people’s attitudes towards bilingualism vary greatly and are sometimes complicated by politics (e.g., unionist vs. separatist), and, hence, it is not always appreciated, one of the main reasons being extravagant costs entailed by multilingualism—and understandably so. For one thing, due to recent decreases in budget and funding, many NGOs in Canada (such as the CCSD, HSFO (Heart and Stroke Foundation of Ontario) and HSC (Huntington Society of Canada) acknowledge that they have been having difficulty accommodating the needs of Francophones (Cameron and Simeon 129-130), even though the dispute over language has never threatened the very existence of the organization itself (Ibid. 116). What is common among all these NGOs, all of which rely on generous funding from federal bodies like the SSHRC (Social Sciences and Humanities Research Council), is the fact that they are all much less bilingual in the internal affairs in the sense that within their corporate boards and committees, in the communications and in their staff operations, the working language is overwhelmingly English (Ibid. 117). University of Toronto professor Richard Simeon labels this as an example of “asymmetrical bilingualism”<sup>31</sup> (Ibid.). While most sociolinguists, especially those working on small, diverse and marginal languages and dialects, are understandably in favor of the survival of their research objects, they tend to ignore the potential cost of bilingualism (Labov 324). More broadly, they tend to disregard the net value of a language or a dialect in terms of—among others—its attractiveness to publishers, the size of its literary output, as well as how well it prepares young children for school (Ibid.).

Another center of gravity in support of bi-/multilingualism (or “plurilingualism”) would be identity. To begin with, there is no guarantee that people residing in an officially bilingual

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<sup>31</sup> As a matter of fact, this term has another shade of meaning in sociolinguistics, which appears to be more “mainstream”. For the sociolinguist, asymmetrical bilingualism, as a variant of receptive bilingualism, refers to a language situation where the allegedly bilingual person is able to speak one language better than understanding it, but is fully communicable in the other language. *Vide* Harding and Riley, 1996, p. 36.

country would be more bilingual in everyday life in general; in fact, in some officially monolingual countries (such as Tanzania), more people tend to use more than one language on a regular basis than in an officially bilingual country like Canada (Harding and Riley 26). In fact, in Canada, one of the countries best known for bilingualism policy, surprisingly few people are fully bilingual, and census figures reveal that seven out of the ten provinces (excluding the territories) are so massively Anglophone that one could go days or weeks without hearing a word of French (Hamilton 12). Even more dramatically, in many parts of Canada, like British Columbia, one would have a better chance of hearing an immigrant language being spoken on the street than French by a Francophone Canadian. No wonder Grant Hamilton calls Canada a “bilingual country full of unilingual people” (Ibid.). This is hardly surprising, as, in most cases, a bilingualism policy is designed to guarantee the maintenance and unhindered use of both official languages and, as such, has more to do with “tokenism politics” than the promotion of bilingualism across the entire population; i.e., everything is politically motivated. It is evident that language use is somehow intertwined with group identity, which is often considered linked to a common bond such as language and race (Edwards 125), and the use of two or more languages would presumably guarantee the speaker membership in more identity groups. Identity and positioning of the self in relation to the social mainstream is a topic of research in a number of areas including sociology, gender studies, cultural studies and psychology. Because of their strong sense of identity, individuals of a society may have a sense of unfairness that gives them the impression that they are not being treated fairly (Engel and Munger 42). Such identity crisis will take shape and even intensify in a symbolically complex environment (Ibid.), with one of the possible scenarios being an all-out withdrawal from mainstream society by the minority language group in the form of territorial concentration and resistance (Cameron and Simeon 17). As linguists Riley and Harding emphatically note, the official labels concerning multilingualism and bilingualism are actually better understood as a political statement towards minority language groups than as a statistical indication of the language composition of inhabitants in a country (Harding and Riley 30). The politics involved should be clear by now, and hence the need of a policy of bi-/multilingualism.

That is only a rough outline of bilingualism. Now let us have a look at how bilingualism is actually implemented in one of the key officially bilingual locations—Canada. The *de facto* constitution of Canada, the Canadian Charter of Rights and Freedoms, has a whole chapter (paragraphs 16 through 22) entitled *Official Languages of Canada* dedicated to official bilingualism, in which the use and equal status of both official languages are guaranteed, but this is not sufficient grounds for optimism for the language situation in Canada. There is an apparent neglect of bilingualism in the province of Ontario, the province in which the national capital Ottawa is located and the largest one by population. Despite the approximately half a million Franco-Ontarians residing in the province, French is not an official language of Ontario, and very few materials and publications are ever translated into French in the private sector, and even when they are, it is usually done in a tongue-in-cheek way with little guarantee of quality. There are two key sets of reasons for this: one is financial and the other one societal (Simeon in Cameron and Simeon 108). The financial set is about how the funding granted to the NGO or department is allocated, in which case the business mindset of a swift and perceivable return on investment is expected is still very pervasive (Ibid.); the societal set concerns the ever-changing demographics in the province, with most new arrivals coming from Asian countries, thereby further marginalizing the negligible francophone community (Ibid.). As a consequence, with the exception of New Brunswick<sup>32</sup> maybe, all Anglophone-majority provinces in Canada share the consensus that bilingualism is an issue best dealt with at the federal level (Ibid.). As one can easily imagine, the frustration and maybe even insult that francophone Canadians still experience today are beyond description.

We will leave plurilingualism as it is now, but we will revisit it (with a different approach) in Chapter Three.

## 6. Bijuralism

Legal tradition, as described previously, is one of the crucial categories in comparative jurisprudence, and the existence of more than one of them in a particular

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<sup>32</sup> New Brunswick is a special case of its own in terms of language rights since it is the only province specifically identified in the chapter entitled *Official Languages of Canada* in the *Canadian Charter of Rights and Freedoms*. It is also the only province that is officially bilingual.

jurisdiction/country/territory would be a fact of consequence that deserves some investigation. At its broadest, bijuralism implies the co-existence of two legal traditions, or “plural legal orders” (Benton 2002: 8) along with their interaction and formal integration into a specific context such as a traffic sign or a contract. Some prefer to call it *mixed* instead of “bijural” (Walton 1980: 1)<sup>33</sup>, while some prefer to call it *hybrid* (Zweigert and Kötz 74). It is essentially a form of legal diversity not very dissimilar to bilingualism being a form of language diversity. More specifically, this form of legal duality, which calls for delicacy and circumspection, can be approached from several angles. The simple co-existence of two legal traditions, the interaction between two traditions, the formal integration of two traditions within a given context or, on a more general level, the recognition of and respect for the cultures and identities behind two legal traditions could all be models of bijuralism (Allard 2004: 1). Bijuralism in the Canadian context is as much a part of the developing federal system as it is a part of the country’s legal system. Some have suggested that a more accurate description would be conveyed by the terms “plurijuralism” and “legal pluralism” (Brown-John and Pawley 1; Benton 2002: 7), or even by the term “multijural” to accommodate those jurisdictions where more than two legal systems coexist and which may or may not include more than two official or widely used languages (Ibid.). Legal historian Benton even went on to prove that plural legal orders in human history have been unduly represented as consisting of ‘sets of “stacked” legal systems’ (Benton 8).

Currently, only about 15 countries in the world share the combination of civil law and common law, and Canada, luckily, stands out at the forefront of bijuralism in this category. An analogy may be made out of language for the legal system—up to a certain extent. Virtually every bijural jurisdiction features some unique underpinnings, which, in turn, involve a number of complex yet interdependent factors. While jurisdictions such as Canada (because of Quebec), the UK (because of Scotland), China (because of Hong Kong) and the USA (because of Louisiana) may be considered bijural, they did not acquire their bijural status in the same way, and nor do all these forms of bijuralism function entirely in

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<sup>33</sup> By the way, a mixed jurisdiction as used by Walton actually has a narrow scope; it means nothing but a legal system where the Romano-Germanic legal tradition has become suffused to some degree by Anglo-American law.

the same way.<sup>34</sup> Last but not least, let's not forget that the European Union, if viewed as one monolithic entity made up of 27 small jurisdictions, can be considered one jurisdiction, and a bijural one at that, even though some comparatists argue that the Court of Justice of the European Union follows the civil law tradition, meaning this court does not have to be bound by its own precedents (Doolan 82). Understandably, most of these jurisdictions that are categorized as bijural feature some unique historical and/or cultural underpinnings.

Indeed, although language and nationality now separate the once cognate peoples of Quebec and Louisiana, both jurisdictions feature a legal system that can be found nowhere else on the North American continent. The legal systems of both “enclaves”, as termed by Friedman (Friedman 2005: 116), are rooted firmly in the Romanist tradition and have become something people in these places pride themselves on. The French imperialists brought to Quebec with them the *Coutume de Paris*, as there was no civil code yet at that early stage, along which a seigneurial (feudal) legal system was in place resembling the manorial legal system in continental Europe that was backed up by seigneurial courts. Despite Britain's annexation of Quebec and its subsequent name change to “Lower Canada”, Quebec, by virtue of the *Quebec Act* of 1774, got to keep its civil law tradition, which culminated with the ultimate promulgation of the Civil Code of Lower Canada in 1866. Fortunately (or *unfortunately*, depending on how one prefers to look at it), Canada retained both its bilingual and its bijural traits. In Canada, there is the civil law of Roman ancestry, begotten by law professors and raised on logic, in the presence of common law, which was rooted in English history and raised on pragmatism. Traditionally, common law has always exerted great influence on Quebec's civil law tradition, at least up until the 1970s, and this is still conspicuous today, while, at the same time, civil law has also cast some influence on common law in Quebec—though in a subtle way (Bastarache in G  mar and Kasirer 117). Today, in most of Canada, common law is still well alive—only with a minor twist in the sense that parliamentary legislation has taken on a more aggressive role, and, at the same time, civil law is just as alive in Quebec. Either way, common, civil and

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<sup>34</sup> Of course, bijuralism can take many forms. In many Muslim countries that are secular (notably, Malaysia), a code or a law would have general application to the whole population, while, at the same time, Sharia law would be reserved for Muslims. This is especially true of court cases involving family law, such as divorce and adoption.



bijural as it is, Canada's legal history is bound up with conquest and colonization, and none of this occurred out of a vacuum (Fitzgerald and Wright 32).

Crucial to the study of bijuralism in Louisiana is a full understanding of how Louisiana came to embrace both civil law and common law. It is, after all, Louisiana's history, with all its imperial intrigue, that renders Louisiana a mixed jurisdiction. As a matter of fact, if history is any indicator, then from a purely legal perspective, many people living in the Louisiana territory at the time of the Louisiana Purchase did not welcome American acquisition of the territory because it would have most likely triggered an introduction of Anglo-American common law into Louisiana's civil law tradition, French or Spanish, the only type of law ever used in Louisiana, and Louisianans were uneasy about the effects of the seemingly arcane common law on vested property rights—and with good reason. In the early days of colonial America, life was rough and crude, and frontier law had a reputation of crudity (i.e., “The law followed the ax”) (Friedman 2005: 107), and any law that could potentially cause a stir was to be avoided. The legal history of Louisiana did not officially begin until 1712, when King Louis XIV granted a royal charter to Antoine Crozat, marquis du Chatel, for the development, administration, and exploitation of the territory. Then circumstances changed, and a few decades later, preoccupied with affairs transpiring on the European continent, France had neither the human nor financial resources necessary to develop its Louisiana territory any further. Finally, rather than let the colony fall into the “wrong hands” of its archrival—Britain, France decided to cede Louisiana to Spain via the Treaty of Paris. Eventually, when both Spain and France lost all their colonies in North America, the civil law tradition, as expected, had to surrender to American government and law, and, interestingly, a massive invasion of settlers doomed continental law everywhere but in Louisiana (Friedman 2005: 113). Unbelievable as it is, upon transfer of sovereignty of Louisiana from France to the United States in 1803, the Americans were in no hurry to forcibly strip the territory of its legacy of the French language and the civil law tradition; quite to the contrary, in fact, as ethnic French who constituted the majority of the local population preferred the substantive private law left behind by their former rulers, eventually only public law, procedural law and criminal law of Louisiana became Americanized (i.e., switched over to the common law tradition) (Ward 2003: 1132). To them, presumably, common law appeared somewhat rudimentary and disorganized.

Across the whole country, the transition, as evidence has shown, was far from smooth (Ibid.), as parts of the country (Texas, Florida, Missouri...etc.) were engulfed in chaos for a period of time while it was fixed policy to Americanize all local legal systems. In addition, another case that serves to demonstrate bijuralism in the USA is that of Puerto Rico, an American territory that is also a civil law jurisdiction because of a transfer of sovereignty to the USA, a common law country, from Spain, a civil law country, in 1898. In any case, when Louisiana finally achieved statehood in 1812, it became the only American state to possess a civil law system, though at one point, Texas was in close proximity to the adoption of civil law too (Ibid. 118). Moreover, the Louisiana constitution of 1812 effectively guaranteed the preservation the civil law tradition in Louisiana, blocking the introduction of Anglo-American common law into the state by forbidding the legislature to adopt “any system or code of laws, by general reference to the said system of the code, but in all cases,...specify the several provisions of the laws it may enact.” This set the prelude for the unique status of civil law in Louisiana, with roughly 80% of the Civil Code of 1825 having been drawn directly from the Code Napoleon. By now, the civil law tradition had been ingrained for generations and simply could not be easily undone. Also, by Durham’s admission, the popular belief that no “American” influence was imposed on the Louisiana legal regime was simply foolish (Ward 1143); instead, the truth is, although the substantive private law of the state of Louisiana remained civil law in nature, the sectors of public law, procedural law and criminal law of the state became decidedly Anglo-American shortly after American acquisition of the territory.

Interestingly, once Louisiana had a civil code and a code of civil procedure, it seems contented and its efforts stopped short of enacting a code of commerce. The French may have left physically with the French language having totally disappeared in Louisiana, but Louisiana’s legal tradition can never be passed off as nothing but a coincidence, some sort of survival or an accident of evolution (Ibid. 119). It, along with that of Quebec, happened not only out of pursuit of glory and primitive necessity, but also for the purpose of assimilation, as claimed by some legal historians (Ward 2003: 1141). This quite possibly would have been the only sensible way for these two jurisdictions to stay abreast of local trends and developments of the time.

Perhaps, here, the school of thought of post-modernism can be of some value here. In post-modernism, faith in grand narratives has taken a plunge as those narratives are confronted with their own contradictions (Tovey and Share 478). Generalization, as it turns out, will be more difficult and diversity in identities will become the norm, with more and more attention given to the local, the specific and the contextualized (Ibid.). Against this backdrop, following up on the subject of bijuralism as it involves the existence of and interaction among multiple legal traditions in the context of comparative law, the legal regime of the European Union as a body of supranational law is of particular interest, making the EU a model of its own for bijuralism. Arguably, due to a greater country count on the civil law side maybe, some consider the EU predominantly a civil law jurisdiction (Glendon *et al.* 318). Member states of the EU have yielded a huge chunk of their sovereignty to the EU over a great array of matters as diverse as trade and commerce, immigration, public health and environmental issues...etc. Basically, being one house of the essentially bicameral EU legislature, the Council of the European Union (sometimes referred to as the Council of Ministers or simply the Council) is the principal lawmaking body of the EU. Because of a lack of attributes of a constitutional order in the absence of a constitutional document, the EU is no stand-alone sovereign state with a specific and exclusive legal personhood.<sup>35</sup> Nevertheless, the EU is vested with broad and general power over vast areas of social and economic life for its citizens in the name of “four fundamental freedoms”: free movement of goods, labor, services and capital. Admittedly, the supremacy of EU law has come at the expense of the sovereignty of member states, which, in turn, has triggered the question of EU law’s impact on the basic legal traditions of all member states (Glendon *et al.* 216-217). There is not a doubt that EU law has had a great impact on both public law and private law. For one thing, because of its membership in the EU, a member state is now required to change its laws in accordance with universal policies adopted by the EU, and for another, the respective legal traditions of individual member states have shaped the character of the EU’s legal order. Fortunately, efforts to forge a new legal order at the EU level have not encountered too many obstacles as jurists and legal professionals across the EU, civil law or common law they belong to, have non-contradictory notions

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<sup>35</sup> There is, understandably, quite some debate over the legal personhood (or the lack thereof) of the EU among international law scholars.

about law on the whole. Needless to say, within the framework of the EU, most legal professionals were trained in the civil law tradition. In short, the central question is one of the reciprocal influences between/among intermingling legal systems (Ibid. 318). Based on EU law, judges of member states are sometimes asked to ignore their domestic laws in order to ensure the consistent and stable implementation of EU laws across all member states. In addition, the upholding of EU law by national courts and all administrative bodies is also required for the sake of certainty in and respect for the legal regime throughout the EU as a whole. Because of this and the limited applicability granted to case law, the civil law tradition is still rather eminent and predominant.

While it is extremely difficult to categorically label the EU as a civil law or a common law jurisdiction with any certainty, there are cases from various member states' national courts favoring either legal tradition. It is clear, therefore, that EU law will weigh more and more heavily on the application and interpretation of all national law of all member states, and this is particularly true with private law, which has been heavily redefined and reshaped by recent developments in competition law (Ibid. 323). The academic practice of the dogmatic categorization of law (such as private law vs. public law) has also undergone challenges coming from both academic circles and legal professionals in practice. As some put it, this may well be a good opportunity to rethink and reconsider fragmented sectors of national laws and to establish the essential foundations of EU law (Ibid. 325).

In sum, bijuralism is like a double-edged sword; it comes with its inherent advantages and also its shortcomings. For the attorney in practice, without a doubt, learning and practicing the law in a mixed jurisdiction has both an upside and a downside. As one would expect, legal education, for one, will have a great deal to do with the bijural nature of the jurisdiction. True, a lawyer trained exclusively in one legal tradition might have trouble handling a case that involves another legal tradition, but, on the other hand, a dual legal education, which gives law students exposure to both legal traditions, will undoubtedly take more time and efforts. In addition, as a case in point, the "foreignness" of Louisiana law may have been a hurdle to attracting foreign or out-of-state investors who may find local laws peculiar. There have been similar issues in the EU. The implications of bijuralism are particularly important under post-modernism since nothing's identity is singular or even

stable; everything is shaped with and by language and a jurisdiction's "membership" in a legal family is shaped by a good many circumstances, external and internal.

### **E. Limitations of Research**

Every scientific inquiry comes with certain limitations and incertitude, and this one is no exception. At the same time, nearly, once again, all research has to build on previous and existing research, and this one, of course, is no exception. If anything, the interdisciplinary nature of my research has quite possibly added to the existing complexity. Indeed, translation studies is a relative young academic discipline that is taking baby steps towards full status by drawing on the findings and theories of a number of related disciplines (economics in my case) with a view to developing and generating its own *modus operandi*, and this, admittedly, has added to the constraint that my research will be subjected to.

First and foremost, perhaps, what qualifies as precise and accurate evidence may vary by field, with each field featuring its specific claims that require different levels of evidence to support them. And as if assigning a numeric value to abstract constructs like happiness and convenience was not hard enough, making interpersonal utility comparisons would probably be even harder, as each person might be employing their one-of-its-kind yardstick. The valuation and evaluation of something—of anything—is never easy, as it requires the quantification of countless metrics, values and variables that may or may not be interdependent, not to mention the fact that people sometimes change their mind and their preferences can be fickle. To make matters worse, choosing which values/concepts to assess using which metrics (or "measures" as Peacock prefers) is arguably an even harder task, and deciding how much weight to attach to each measure for the construction of a valid construct would be an arbitrary thing (Peacock 80).

Second of all, while economics may sound preposterously simple to the lay person, there is much serious and non-obvious content to economics that requires more than sheer "common sense", and any light-headed and non-rigorous approach to economics will lead to the wrong conclusion. Next, while comparison and evaluation both require quantification, the practice of economic modeling that is based on the quantification of

every value identified as significant, which is usually substantiated in terms of a state currency (typically the dollar or the euro), will be called into question. This is by no means a personal or a coincidental thing, for, to begin with, which values are significant and hence deserve to be quantified would be an objective thing on the part of the researcher (which, in this case, is myself). Intuitively, one would think that these dollar values should be determined by whoever is bearing the relevant cost or whoever is enjoying the relevant benefit, and yet it goes without saying that these figures could become distorted by exaggeration and/or underestimates. This is particularly true for cases involving items/goods that lack a fair market value (e.g., unique antique items). Moreover, there is the ambiguity due to wealth effects, i.e., the difference in value assigned to the same benefit/loss between two individuals of unequal wealth (Polinsky 2003: 164). Indeed, economists have confessed that values that are difficult to quantify often end up getting discounted or, worse yet, ignored altogether (Malloy 66). At the extreme, there are some who even deny the validity of a valuation system based on exchange value or market value for the reason that money is not capable of assigning value to something with permanent value and not normally treated as a measurement of wealth (White 83). For me, understandably, there are quite a few values in translation (colloquialness and “PC-ness” being two of them) that have proven very difficult to quantify, but I have tried everything possible to keep errors, statistical and incidental, to a minimum for my research.

At a more fundamental level, economics requires the abstraction (or manifestation, depending on how one chooses to look at it) of everything that is placed under scrutiny (in this case, the parameters regarding legal translation when two distinct legal traditions are involved). Moreover, while this may sound rather complicated, identifying values that are relevant and meaningful to the study at hand in the first place would probably be more complex yet. Frankly, some of this will have to be arbitrary on my part. On top of all that, there will be ethics involved in the quantification, the expression in monetary terms, or the “dollarization”, of certain values, especially those involving the health, freedom or life of a human being. While my research hardly touches on human body or life interests, it does involve some intangible interests such as justice and equal protection of the law, among others, and these are complex enough. Besides, people can be fickle with their observations, and any numeric value they provide in regard to a value may thus be unstable

and unreliable. Last but not least, there is always more than one view involved—even within the same discipline.

Then comes my choice of legal traditions to work on and to obtain examples from. While I made no bones about having to leave out legal traditions like the Islamic tradition due to time and resource constraints, it was nonetheless a hard decision for me. The most central reason for my choice was mainly logistical and economic, as I personally have little background in Islamic law or socialist law, and, more importantly, common law and civil law are ostensibly the two predominant legal traditions found in the EU. There must be quite a few legal concepts from the Islamic law tradition that outright lack a counterpart in either one of my legal traditions, that require new features and parameters for a true reflection of reality. Hopefully, however, the difference between sets of legal traditions selected will be minimal because translation theories are supposed to transcend all human languages, and, presumably, all legal traditions.

Economics being a behavioral science, it is supposed to focus its attention of human beings and their behaviour/personality. Since my research is a multidisciplinary one that employs economic methodology, it must treat different people with diverse backgrounds (such as legal professionals, translators, legal translators, Francophones, Canadians...etc) categorically. And this, of course, could invite suspicion of generalization, or even *over-generalization*. In fact, many social scientists have come under fire for making claims about a certain community, ethnic or religious, that are too simplistic and almost inappropriate, for, by their own admission, such a discussion, however well-intentioned and convenient, might risk assuming a collective identity that does not even exist (Nic Craith 24). Much as I have always tried very hard to steer clear of over-simplification of things, it is still sometimes unavoidable, and when there are signs that this might be the case, I would always make a note acknowledging that diversity and difference within a group is always a possibility.

Finally, social sciences are fundamentally different from natural sciences in that there will almost always be exceptions to a rule or a theory, whether the research being carried out is a quantitative one or a qualitative one, and, as such, there will always be people who are skeptical and demanding more evidence before they are willing to accept the pattern

allegedly established by the researcher (as a quick example, while it may be self-evident that the translator knows more about the text than the target reader, there are always *some* exceptions where *one* target reader happens to be more in the know). Translation studies being a social science that deals with interactions among social beings, my research will inherit all the inherent limitations applicable in a paper on, say, sociology. As a quick analogy, while historians try to reconstruct the past out of existing historical fragments in an objective way, those fragments then have to be interpreted subjectively in order to arrive at a narrative (Nic Craith 31). What this means is that if it is possible for historians to distance themselves from their own social identity and prejudices in their line of work, and if a historian's work cannot be dismissed outright simply because it had to be based on some personal and subjective evaluation, then it would be equally possible for a legal translation theorist to construct a balanced theory that touches on economics and law based on examples of legal translation from real life.



## Chapter One: Legal Language, Legal Translation and Multilingualism

Tongues of the World, Unite!

(Alison Gillmor on Esperanto)<sup>36</sup>

### A. Introduction

Before we go into details of the language of the law, we should probably have a tacit understanding of what the law is and what it does. Yes, the law has its own standards for existence. Despite the prestigious and respectable status that law, as a research subject, has been enjoying, today, even legal scholarship is experiencing a challenge: the epistemological challenge that is calling for the introspection of law. At the same time, academics across legal scholarship are still struggling with the ontology of law, debating whether law is a means to an end or an end in itself (Watson 115). As a consequence, questions such as *Qu'est-ce qui caractérise la pensée juridique, en tant que rapport particulier au monde?* as well as *Le droit est-il une science?* are either being presented for the first time or being examined and re-examined time and again (Noreau 2007: 2). And with good reason. Why do (most) people follow the law (most of the time)? Why do they have to follow the law? Or, better yet, why is the law imposed on rank-and-file citizens typically without their consent?

Ontologically speaking, the law, or *law* in general, is a body of regulations expressed with overwhelmingly exotic vocabulary that might require some imagination on the part of the lay person (Smith: 2004 176). While I may have reservations about the view that law talk is “just words” with respect to the nature of law (Ibid.), one thing is for sure: the law phenomenon—as a human construction with far-reaching effects—must inevitably be embodied in language, and, by inference, via the use of words and utterances. This *in se* will make for a complex situation, for, the law being composed of language, the many legal terms and expressions found in routine use will naturally be open to multiple equally justifiable readings—first by the judge (in common law jurisdictions) or the lawmaker

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<sup>36</sup> <https://thewalrus.ca/2006-09-language/> Accessed on 18 September 2018, at 20:12 (UTC+8).

drafting the law, and then the individual whom the law is meant for and finally by the judge who is supposed to follow and enforce the law. In case of conflict or ambiguity, judges must use their conscience and discretion to choose (or to *dictate*, as some would prefer) the interpretation that appears the “fairest of them all” (pun intended). In addition, a legal text, just like any other text, comes with some limitations, and we should never underrate the potential of legal texts to influence human activity. Thus, the art of lawyering and trial advocacy, both entailing extensive use of words and language, is believed by some to be “grounded in the process of interpretation” (Malloy 2005: 1). Since virtually all documents—no matter how thought-out—are susceptible to ambiguities and gaps given the lapse in space-time, the legal text can only get us thus far (Tiersma 1999: 132), and one secondary function of courts is to create “rules” to fill in gaps left behind—deliberately or nonchalantly—by legislation (Greene 2006: 6). This, I believe, is one of the very basics that the legal translator should understand when handling legal texts.

Next, despite the fact that translation studies does have linguistic activity as one of its key research foci, the subject matter of translation studies actually has more to do with semiotics, the science of signs, than it does with linguistics. This is because, at its core, translation involves the transfer of meaning as demonstrated by one set of language signs into another set, each with its own peculiar convention and regime. At the same time, this is what anthropologist Edward Sapir sharply asserted:

No two languages are ever sufficiently similar to be considered as representing the same social reality. The worlds in which different societies live are distinct worlds, not merely the same world with different labels attached to them (Sapir 1964: 69).

The well-known French translation theorist George Mounin also made a similar claim:

Une langue nous oblige à voir le monde d’une certaine manière [...] et la linguistique contemporaine aboutit à définir la traduction comme une opération relative dans son succès, variable dans les niveaux de la communication qu’elle atteint (Mounin: back cover).

The influential language scientist of Switzerland Ferdinand de Saussure noted in his canonical work *Course in General Linguistics* that:

[...] for the realization of language, a community of speakers [*masse parlante*] is necessary. Contrary to all appearances, language never exists apart from the social fact, for it is a semiological phenomenon. Its social nature is one of its inner characteristics. Its complete definition confronts us with two inseparable entities [...]: languages and community of speakers (Saussure 1966: 77).

Apparently, what the three connoisseurs meant to say is that no natural human language can possibly exist outside the context of culture, and nor could culture ever exist outside of language<sup>37</sup>, and therefore any translator who dares to attempt to translate anything out of context does so at his own risk (and end up pleasing nobody).

Because of these inherent complications for translation surrounding equivalence and culture, coupled with the unique nature of legalese, legal translation, which deals primarily with legal documents and legal instruments filled with legalese, is a highly demanding task, and legal translators are constantly confronted with the asymmetry of legal systems, the relativity of legal concepts, not to mention inconsistent categorizations and classifications between legal traditions or even just legal regimes in their usual line of work. As Canadian legal language and legal translation specialist Jean Kerby once noted, as if the all-too-familiar issues concerning legal language were not enough (such as translatability and terminology), the enterprise of legal translation, at least in an officially bijural and bilingual jurisdiction like Canada, has two aspects: a legal one and a linguistic one, which are so intertwined that it is very difficult to account for them separately.

We will now have a look at how the categories of law, language and culture interact with one another.

## **B. Law and Culture**

While most people are ready to accept that language is a cultural construct, far fewer realize that law is also a product of human cultural wisdom. Also, law, as a cultural construct, reflects the moral sentiments of the contemporary society in which the law exists.

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<sup>37</sup> *Nota bene*: While, in my opinion, it might be possible for a specific culture to exist *without* language (consider human beings living in prehistoric times), what I am arguing here is that culture and language are intimately integrated regardless.

Admittedly, legal culture has been cited for a wide range of purposes in comparative law scholarship, with some people calling for more attention on the differences and anomalies among legal systems and legal traditions (Cotterrell in Reimann and Zimmermann 711). Meanwhile, language and culture are also inextricably linked, and if we regard law as an integral element of culture, then, by inference, language and law would somehow be interrelated and even interdependent.<sup>38</sup> It has long been established among scholars that there exists a close link between the livelihood of a society and the lexicon of the language spoken in that society (Wierzbicka 1). What is more, language philosopher James White asserts in one of his works that law—along with economics—must be treated as an essential aspect to culture (White 1990: 46). A country’s legal regime reflects that country’s culture, and for the comparative law scholar, it will then be assigned a place within one of the major legal traditions that are “accredited” academically against a set of criteria. In this sense, then, comparative law is a platform where law and culture get examined side by side, and, as such, it is also where legal translation comes into play, as it allows for the identification of similarities and differences across a spectrum of legal traditions, making it easier for the academic doing the comparing to identify “equivalents” across legal traditions. This in no way suggests that the law is exclusively a product of culture and more than languages are exclusively a product of culture (Everett 201). Inasmuch as law and culture concern translation, thanks to the cultural turn of translation, translation is viewed as a cultural transfer process aiming to render an effective communication between cultures. Law is a cultural category, occupying an important place in society, and the role of legal regimes and institutions cannot be fully justified and explained if not placed in the context of the relevant culture, and, at the same time, a culture cannot be fully understood either outside the context of the relevant legal regime (Pommer 2008: 17). Any comparatist will encounter frustration with their work if they are not mindful of this.

How much culture does statutory law, as a type of law, reflect? Statutory law reflects legislative intent (which is part of its legislative history), which oftentimes has more to do with partisan politics manipulated by mealy-mouthed politicians—people who are

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<sup>38</sup> Culture, inasmuch as it concerns translation, should be understood in the broader anthropological sense to subsume all socially conditioned aspects of human life. *Vide* Mary Snell-Hornby, *Translation Studies: An Integrated Approach*, Amsterdam: John Benjamins, 1988, p. 39.

popularly elected and care about how to get re-elected more than anything else—than with true justice. Thus, even if they are believed to reflect culture, laws do not necessarily reflect justice, not to mention that injustice is sometimes deliberately imbued into the laws that politicians pass with tacit support from their electorate. Thus, by the way, the price of justice, like freedom, is eternal vigilance (Gibbons in Gibbons 195), and this justifies the need for judicial review in countries that have it, and at the same time it serves as a basis for non-interventionists who would rather that the judiciary steer clear of politics by leaving decision-making authority to other governmental actors (Maltz 4). Most likely, in this regard, perhaps not even the efficiency argument would provide a way out; transaction costs<sup>39</sup> are often so prohibitively high for an efficient outcome to occur, let alone for one to be carried out, nullifying the argument that laws are enacted for their efficiency instead of for their service to ferocious special interest groups, which are usually very good at lobbying (Frank 2008: 133). Judge-made law, on the other hand, is a corpus of legal principles, often abstract and intangible, inferred and extracted from all relevant precedents available, and translating this type of law is never any easier, because common law, too, is culture-based, and interpreting what is going on in the judge's mind, despite the many rules and protocols regarding *stare decisis* summarized over the ages, is no easy task. In this regard, then, common law, or judge-made law, should probably not be considered a source any more reliable than statutory law, as most contextual information is simply suppressed from case reports with the filtered-out details often turning out as the most critical ones. At the same time, there is no uniform rule on statutory interpretation for common law judges to follow either; in the US, the general policy is to attempt to interpret a statute in the light of the intention of the legislature, whereas in Britain, courts often maintain that a statute should be read with as little reference to legislative intent, which is something difficult to ascertain, as possible (Kempin 15-16). In response to this, as a counterattack maybe, Karl Llewellyn, the founder of the revolutionary school of legal realism, claimed that all facts that the judge has hidden from people consciously, or, as in most cases, subconsciously, must be made explicit to everyone at the first opportunity (Smith 2004: 94). Yet, since this is no simple task, some, speaking through experience, argue that judge-made law is not

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<sup>39</sup> These costs roughly include the costs of identifying the parties with whom one has to bargain, the costs of getting together with them, the costs of the bargaining process itself (typically all parliamentary costs) and the costs of enforcing any final deal reached. *Vide* Polinsky, 2003, p. 14.

supposed to be regarded as a likely source of wisdom any more than statutory law should (Ibid.), apparently implying that the judge and the lawmaker, both being human as they are, might be equally unpredictable—though possibly for different reasons. If this is really the case, then who is the jurist to claim that he is able to ascertain the “true intent” of the law (judge-made law or parliamentary law), let alone the legal translator?

Whenever a judge is trying to interpret a law, he will inevitably be walking a fine line between *making* law and merely *commenting on* it, as the former risks violating the constitution-based principle of the separation of the three powers. Similarly, as every act of translation involves a phase of interpretation—however subtly—it is far from objective and neutral and is almost always shaped on the basis of some “pre-understanding” on the part of the translator (Glanert 2014: 5). Indeed, back on the law front, no one can deny that it is sometimes difficult for courts, or more broadly, the judiciary, to steer clear of the very incidental law clarification function altogether in legal discourses, which is often frivolously referred to as the “law-making” or “policy-making” role of courts (Greene 2006: 5).

Thus, the line between making law and interpreting law can be a blurred and treacherous one. “How does law ‘mean’?” (instead of “*What* does law mean?”) is an age-old question that jurists have been asking themselves that reaches into the untouchable abyss of metaphysics.<sup>40</sup> While, as Smith so modestly and yet firmly argues, the most common understanding of the meaning of a legal text centers on the semantic intentions of the original author(s) of some sort, he does confess that many in academic circles will find his position untenable (Smith 2004:101-102). Of course, even though most laws are designed to survive extraordinary times, there is no denying that a particular law, just like any rule or document, might not have a meaning as stable as the author, the drafter or the framer would have wanted it to have (hence the “autonomy” and “sovereignty” of the reader), which is precisely why the American constitution, for one, was able to remain relatively stable over the centuries with only minor amendments and changes made to it (Whatever “cruel and

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<sup>40</sup> In his publication *Laws’s Quandary*, Smith has a chapter entitled *How does the law mean?* listed under *Part III: The Metaphysics of Legal Meaning*. For quick reference, in Smith’s words, the meaning of a legal text is “necessarily given by—indeed, is basically identical with—the semantic intentions of an author or authors of some sort.” For details, please refer to Smith, 2004, pp. 101 *et seq.*

unusual punishment” means in Amendment VIII to the Constitution of the United States and Section 12 of the *Canadian Charter of Rights and Freedoms* to us today is not guaranteed to hold water tomorrow.). Few legal terms are self-defining, and little by little, a law, which typically comprises countless legal terms, changes with the handing down of each court case, whichever party prevails, and hence the lawyer’s aphorism that the law changes with its application over time (Kempin 6). Indeed, the true meaning of a word or term should never be restricted to its historical or etymological frame; instead, words and phrases should be allowed to mean what speakers of the language want them to mean today, and not necessarily what they *used to* mean (Harding and Riley 16). Furthermore, a distinction must be drawn between language in use and language *not* in use; or, put another way, the meanings of a word as a dictionary entry might only be part of the semantics it may have when uttered in real life (Ibid.). A word or a term may have two different shades of meanings: a semantic meaning and a non-semantic meaning (Smith 104). How statutes are interpreted is a cause for controversy. The literal rule, which is the most basic and perhaps most widely employed, dictates that the wording in a statute must be taken to mean its ordinary and natural sense, since the best way to interpret the wishes of Parliament is to just follow the literal meaning of the words they selected (Elliot and Quinn 26). Yet disputes arising from a law or a legal text typically concern the semantic meaning, but this is by no means always the case, as the semantic usage and the non-semantic usage often tend to blur into each other (Ibid.). By the way, the functional use of language and the common knowledge (or shared knowledge) background on which our description of the world is based (for example, when we, in the West, ask a friend what they will be doing on the weekend, we typically mean Saturday and Sunday, while in some cultures, like the Islamic culture, it generally refers to Friday and Saturday, and in yet others, it may refer to Thursday and Friday, like in Iran) matter too. Equivocation and slippage are such constant dangers that they could even be a leading cause of horrific deviation from author’s intention (Ibid. 105). This is true of legal texts all the same, and legal translators should know this.

To make matters worse, the language of judges as manifested in court decisions would be another hot-button issue, and all that glitters is not gold. To begin with, for most people, the courtroom is an eccentric—even esoteric—setting where self-claimed “professionals” engage in a series of activities wherewith outsiders can hardly identify themselves. This is

hardly surprisingly, as what gets communicated most is hierarchical power (Maley in Gibbons 32). As a matter of fact, a judge's courtroom discourse is just as political as it is legal, and, as such, judges are, in effect, enacting political ideological stances whether they want to admit it or not (Philips 1998: xiii). This, in fact, was confirmed by Dworkin, who, considering law so highly political, asserted that lawyers and judges cannot avoid politics in the broad sense of political theory (Dworkin 2002: 527). Dworkin even asked himself this: What sense should be given to propositions of law? (Ibid.). Obviously, there is no easy answer to this one.

Yet, over the years, there seems to be a lack of academic writing on the translation of court decisions either during the deliberation or the write-up for delivery and publication (Weston in G  mar and Kasirer 447-448), and this has possibly contributed to the widespread ignorance of the ideological nature of judicial decisions and the legal translations thereof, and hence the significance of the recent but rapid development of jurilinguistics. This will be covered in more detail later in this research. In any case, what makes the case of court decision translation remarkable is the fact that most courts/venues have only a limited number of official languages for their written decisions. In the case of the European Court of Human Rights (ECtHR), by virtue of its status as an establishment sanctioned by the European Convention on Human Rights (ECHR) within the framework of the Council of Europe, it only has English and French as its official languages, and all its documents need to be presented in either French or English (oftentimes both). This may appear simpler than having to translate one court decision or one judge's opinion into, say, all six working languages of the UN, but, in reality, that is not always the case. In fact, having to translate a court decision into either French or English, as is the case for the ECtHR, might probably be even more challenging, since the legal translator would be even more heavily burdened with an ethical responsibility, which, in turn, would make the translation of law yet more transformative, thereby putting an end to the myth that legal translation is but a simple linguistic transfer for law (Kasirer in G  mar and Kasirer 595).

By contrast, surprisingly, things seem to be much simpler (or more complicated, depending on how one decides to look at it) with the European Union, of which the European Court of



Justice (ECJ)<sup>41</sup> is an integral part. The EU has 28 member states and 24 official languages, and yet at the same time, the majority of the ECJ's judgments are usually drafted exclusively in French—the court's working language (Ibid. 449). Ironically, though, only the version in the language of the case would be authoritative (Ibid.). As a result, the staff composition of the ECJ is unique in that while expanding its jurisdiction into a wider and wider range of cases over the years, it has also been recruiting jurists from many different legal traditions and allowing the ECJ to conduct its proceedings in any of the 24 official languages (Glendon *et al.* 1999: 299). Since, in principle, only the version in the language of the case (the language in which the case was first filed) will be authoritative, this makes translation relatively simple since there will only be a limited number of language pairs/directions. At the ECtHR, though, because judgments may only be drafted in either French or English, some unexpected side effects may ensue despite the potential savings from translation-related cost (Ibid. 449-450). Moreover, under article 47 of the Charter of Fundamental Rights of the European Union in re citizens' right to an effective remedy and to a fair trial, every case filed in the Court of Justice of the European Union (CJEU) context should be decided in a timely manner, as unnecessary delays will defeat the purpose of justice (as the legal maxim goes, "Justice delayed is justice denied"). This, of course, will further require accuracy and clarity of legal translation.

### **C. Law and Language**

First of all, language is the historical deposit of a community's social life (Berman 20). Nowhere would this claim be more obvious than in the legal profession. Legal language, as a language of special purpose, is a highly technical language form, which is exactly what shows how central language is to law and how inconceivable the law would be without language (Gibbons in Gibbons 1994: 3). While something like "law is language" may be too extreme a claim to make, there is little doubt that law and language are intimately intertwined; in fact, some academics even go as far as to regard law as a "constant

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<sup>41</sup> To be precise, the Court of Justice of the European Union (CJEU) is the full name of the judiciary of the EU. It consists of three main sectors: the European Court of Justice (ECJ), the General Court (EGC) ("Court of First Instance" before 2009) and the Service Tribunal. The composition of the ECJ is 28 judges (one from each member state) and 11 advocates-general.

linguistic competition”, where the jurists’ arguments and judgments (or oratory in general) mean just as much as their descriptions of facts (White 1990: 81)<sup>42</sup>, not to mention that comparative law scholars consider the interplay between law and language to be one of the three “pillar issues” to be contemplated and settled for any understanding of a foreign, especially an exotic, legal system to be meaningful (Merryman *et al.* 37). The language of the law, apparently, is so unusual and surreal that tax law professor Stephen Cohen notes in one of his papers that a taxation instructor is forced to be a teacher of language at the same time, having to focus on the too many “ambiguous, imprecise and confusing words that are embedded in tax law and discourse” (Cohen 2005: 600). Comparative law scholar Markesinis, through his comparative research on legal education on both sides of the Atlantic, lamented the shallowness in knowledge amongst law students in the US due to the neglect of language training (Markesinis 30-31). Because of this, some even claim that a trial (especially one at common law) is just like a battle fought not with swords but with words (Madley in Gibbons 33). The two categories of law and language are so closely interconnected that, according to some, the intersection between them often goes undetected at times and only gets identified when legal translation is required (Husa in Baaij 2012: 161), in which case equivalence by way of conformity to the rule of law would become the focus. At the same time, complete conformity to the rule of law would probably be an idiosyncrasy, as there will always be some vagueness and ambiguity, not to mention that maximal conformity is not always desirable (Raz 222).<sup>43</sup> Further, in the litigation context, legal proceedings are, almost without fail, conducted through legal discourses that are an embodiment of language, and for this reason, a trial is a linguistics event through and through (Gibbons in Gibbons 1994: 3).<sup>44</sup> Also, because of this, any reform of legal discourse must take into account the contingency between language change and change in the law for it to be desirable and successful (Maley in Gibbons 48).

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<sup>42</sup> As a matter of fact, to boot, White goes one step further by claiming that legal discourse must proceed with some “structural tentativeness” if it is to proceed properly, and that the law is but a system of translation that is aware of its own inadequacies (emphasis mine). *Vide* White, 1990, p. 81.

<sup>43</sup> By the way, in this sense, translation theory and the rule of law do have something in common: the acceptance of occasional loss and non-conformity during the process.

<sup>44</sup> Of course, this would be particularly evident in an adversarial trial proceeding, which is more of a trial of strength in which the party with stronger evidence prevails. By contrast, the continental system is an inquisitorial proceeding that is more of a trial of inquiry.

From a slightly different perspective, though, sociolinguists have long been dealing with the interaction between language and society, providing theories as to who will likely say what in what kind of situation at a given moment, and they have shown time and again that, generally speaking, written language is more formal than spoken language. This description makes the language of the law a perfect subject for sociolinguists. Even economists have noted the uniqueness of the language that is adopted to describe and conduct economic transactions and exchanges, which are highly community-based categories (Malloy 114). Against this backdrop, turns out that legal language has a very locale-specific and historical dimension to it, and this is reflected most conspicuously in its vocabulary (Glanert 2011: 137). Today, some types of legal documents (such as insurance policies and apartment leases<sup>45</sup>) have become so formal and rigid that some linguists regard their styles as “frozen”, thereby suggesting that documents presented in this way allow for hardly any latitude from pre-set or tacitly accepted norms (Berk-Seligson 2002: 13). Yet, still, these documents remain rife with lawyer’s “mumbo jumbo” and are mostly beyond the layperson’s comprehension. This could prove frustrating for the general public to whom these rules and regulations apply. In the words of David Mellinkoff, one of the forerunners for legal language as a stand-alone subfield, four features—or more precisely, four “mannerisms”—are characteristic of the language of the law: unclearness, pomposity, wordiness and dullness (Mellinkoff 1963: 24). As Glanert points out, as have some legal translation professionals, the language of the law is made up of a vocabulary that is extremely characterized by a past that is becoming more and more remote and distant (*éloigné*) and harder than ever for the general public to comprehend (Glanert 2011: 137). Also, at the discourse level, legal language is characterized by two general but salient features: lack of cohesion and a compact appearance (Berk-Seligson 17). Berman agreed that legal language should be clear and easy to understand while focusing on the supremacy of courtroom discourse (Berman 32). All in all, the frigidness of legal documents like an employment contract and a police report is a direct result of the inherently rigid and excessively official nature of legal language. Unfortunately, little has changed over the past few decades.

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<sup>45</sup> Contracts of adhesion have become a way of life in many day-to-day situations, such as renting an apartment and signing up for cell phone service. Yet, many consumers still find them hard to understand and, as a result, have no choice but to sign them without bothering to go through them in any detail—if at all.

Admittedly, human language evolves in rather specific economic, historical, social, political—and maybe even juridical—contexts, making the task of translation much harder than it appears at first glance. Human language is something constitutive of the world in which we live, and the long-held debate between source-oriented translation and target-oriented translation is still very much alive (Baaij in Glanert 114). At the same time, the law is probably as much a social institution as it is a cultural one, even though it might not be intertwined with culture and society in the exact same way as language. As a result, legal language, the object of study of jurilinguistics, would inevitably become a hotbed of complexity and controversy. Truth be told, despite technological advances and institutional reforms we have seen during the last century, it is still hard to escape the impression that the law is more accessible to some people than to others. Why is the law still failing to live up to its ideals? Will the law ever become what it is cracked up to be? Law and society scholars Conley and O’Barr think that the failure lies in the details of everyday legal practice, namely details that consist almost exclusively of language (Conley and O’Barr 3). To make matters worse, legal translation, the translation genre that deals with legal documents and courtroom discourse, will certainly be a source of calamity and all-out academic insurgence. After all, any legal regime, the corpus of all national laws of a country reflecting that locale’s particular values and culture, must belong to (at least) one legal tradition, and, as a result, the legal translator, who is dedicated to the transfer of one law from one land to the “law” of another land in another language, must not only be bilingual and bicultural, but they must also be “bijural”<sup>46</sup>. This is, of course, especially true for a target-oriented<sup>47</sup> legal translation than a source-oriented legal translation, since a target-oriented translation will require of the legal translator more accurate and thorough knowledge of both the source and the target legal systems, as well as comparison skills for all relevant legal traditions involved (Baaij in Glanert 109). Admittedly, this is because in order to establish an equivalence link between the target legal text and the source text, the legal translator needs to observe and understand—and maybe even hypothesize—the specific communication situations in which the judiciary would interpret the two texts

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<sup>46</sup> Some prefer the adjective term “bijuridical” and the noun term “bijuridism”, which is obviously a loanword from the French word *bijuridisme*. Vide Michel Bastarache, *Le bijuridisme au Canada* (luncheon on bijuralism and the judiciary, Department of Justice, Ottawa, 4 February 2000)

<sup>47</sup> Sometimes, the term “receiver-oriented” is preferred, as in Baaij in Glanert, p. 109.

(Ibid.), and taking a guess on how a judiciary would accept and interpret a legal text is no easy task for someone who has never practiced law for a career. Professional lawyer-legal translator Thomas Mann not only stresses the importance of a deep understanding of the source law and target law as well as the discrepancies between them, but he also warns of the complexity of legal writing (e.g., convoluted sentence structure and archaic language), the immense breadth of the law itself and its relevant specialty areas (Mann 10). In conclusion, he disbelieves the idea that anyone could possibly have the capacity to handle all these things for one task on their own (Ibid.). This, in my opinion, tells us just how difficult it is for the legal translator—or anyone—to be bilingual, bicultural and bijural all at the same time.

The interdependent relation between law and language is quite clear in connection with legal interpretation, and perhaps Ronald Dworkin, who was famous for his critique of Hart's legal realism, can shed some light for us here. As an opening statement, his proposition is that law is interpretive in that it is whatever follows from a constructive interpretation of the institutional history of the legal system. In short, in Dworkin's eyes, people's understanding of the law can be improved via a contrast between legal interpretation and interpretation in other fields of knowledge (Dworkin 527). While judges, without a doubt, do make law, scholars are divided on whether judges should make law on policy grounds through their use of legal language (Elliott and Quinn 18). Some consider it an advantage of the open texture of legal language to allow the law to adapt easily to current policy (Hart 120), while others are skeptical about judges being in a position to produce policy-based law.

Sylvia Smith puts an even finer point on it. In her paper entitled *Culture Clash*, she explains that the system-bound nature of a legal text means that successful translation into another language requires competency in at least three interrelated and yet separate areas: first, basic knowledge of all legal systems concerned, both of the source and target languages; second, familiarity with all relevant terminology; and third, competency in the specific legal writing style of the target language (Smith in Morris 181). In other words, in her eyes, the ideal legal translator should be bijural, bilingual and, at the same time, a stylist and an orthographer. Without these qualities, the legal translator's rendering of a legal text would

be little more than a word-for-word transliteration that will, most likely, do more harm than good for the target readership.

#### **D. Nature of Legal Language and Legal Interpretation**

##### **The Nature of Legal Language (or Legalese<sup>48</sup>)**

To begin with, as law professor Harold Berman kept stressing, the language of law is undoubtedly “one of the most important types of language spoken by a community” (Berman 64). Indeed, what is termed *legalese* makes up a very essential part of a legal system; the discourse of law is one important aspect of the legal system and legal culture (Maley in Gibbons 48). No wonder Jeremy Bentham made legal language one of his chief life concerns. One of the key figures in this area today is Peter Tiersma, who has published extensively on law and language and language crimes. There appear to be several views on the epistemic nature of legal language, but before anything, we should know that there is a great degree of variation even within the category of legal language. Not only does legal language vary by geographic location, but the language and style of lawyers also differ from one genre<sup>49</sup> of writing to another (Tiersma 139). At the same time, as legal language expert Adam Freedman warns, there is a huge gap between the language of the public and that of the legal profession, which is, sadly, getting wider and wider day by day (Freedman 5). While this might not entirely be a bad thing (Seriously, isn’t standard language losing ground to text talk, or “textese”, like “gr8 training 4 leaders of 2moro”? And is textese not contributing to the decay of standard language?), it does mean that the law—something everyone should understand and conform to—is becoming less and less accessible to the average citizen. The fact that legalese is drifting away from everyday language is, at least for Freedman, a lamentable thing as “the story of legal English is the story of the English language itself” (Ibid. 6). In any case, however, in terms of legibility, the lay public is

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<sup>48</sup> Some sociolinguists/jurists prefer the term *legalese*, as demonstrated in Berk-Seligson, 2002, 14.

<sup>49</sup> Some of the most common legal genres include pleading, petition, statute, legislation, enactment, private legal documents such as wills and contracts.

generally under the impression that legal language is supposed to be highly incomprehensible, and such (in)comprehensibility of legalese is arguably affected both by the lexical nature of a text and by syntactic features (Berk-Seligson 17). At the same time, in terms of historical value, legal language will always be a “bearer of some specific historical heritage”<sup>50</sup> (Glanert 2011: 137), which would serve as partial justification for its use of archaic language.

Despite the two great virtues of legal language of clarity and simplicity as proposed by Berman (Berman 64), legal language is, paradoxically, often opaque and hard to comprehend for non-legal professionals. This brings us to the essence and substance of legal language. In regard to the true nature of legal language, Tiersma proposed several possible categories; presumably, it could be one of these things: a separate language, a dialect, jargon, argot or a style (Tiersma 142). Yet in response to his own question, he laments that none of these alone would be sufficient to accurately describe the true nature of legal language—most likely even after a thorough examination of every possibility. By way of elimination, he scrutinizes every possibility in detail before finally rejecting it or accepting it. First, he does not consider legal language a **dialect**, because, in his mind, a dialect should be a geographical variation of the standard language<sup>51</sup>, even though he does acknowledge the various dialects of legal English (Ibid.). Secondly, he rejects the idea of **jargon** too, for, to him, jargon<sup>52</sup> means nothing but the “vocabulary of a trade, occupation or profession”, and even the term “term of art” would make a better description of it (Tiersma 107). Practically every conceivable science, profession, trade and occupation has its own set of words and phrases, some of which are slang and others technical, depending on the status of the person using them (Fromkin and Rodman 428). True, a special mode or style of writing or speaking could be part of the jargon, as is the case of the legal profession-wide practice of referring to a rule or doctrine by the name of the case that

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<sup>50</sup> Original text: *La langue du droit est, en effet, toujours porteuse d'un patrimoine historique spécifique.*

<sup>51</sup> Quite possibly, this would be open to heated debate. In sociolinguistics, a dialect may or may not be a geographical thing; it could be a social thing too.

<sup>52</sup> For the sociolinguist, the term *jargon* refers to a set of words and terms belonging to a particular profession, trade or even social class (in this case, it is sometimes known as ‘street slang’). Moreover, some academics do not wish to draw a fine line between jargon and argot. *Vide* Fromkin & Rodman, *An Introduction to Language*, pp. 427-428.

established it<sup>53</sup> (Tiersma 107), and legal terms like *demur* and *caveat emptor* may be considered jargon terms, but in no way does this make the category “jargon” a better reflection of legal language. Thirdly, to no one’s surprise, the idea of legal language as an **argot** would be unacceptable to most people since an argot would be too loaded a category with extremely negative overtones, and, besides, it would probably be too cynical and judgmental to argue that legal language is primarily geared towards an esoteric circle and deliberately made unintelligible to outsiders (Ibid.). Then comes **style**. Could legal language be considered a style, which refers to the personal and unique language habits of a particular individual or a group of individuals? While Tiersma believes that the idea of legal language being a style, while slightly more promising, is still insufficient in explaining the apparent peculiarities of language use across the legal profession (Tiersma 142). As a side note, translation theorist Basil Hatim categorically considers legalese, along with other “eses” such as journalese and, presumably, textese, a stylistic convention that is intuitively perceived or externally defined (Hatim in Munday 39). This position seems to correspond with the view of legal language as a style.

Last but not least, even though Tiersma never made a mention of it, but what about **register**? Could legal language be viewed as a type of register? Sociolinguist John Gibbons, for one, indirectly implied that the language of the law forms a “legal register” (Gibbons in Gibbons 196). In fact, one scholar, Susan Berk-Seligson, whose area of concentration is legal language and bilingualism, seconds this view and refers to legal language (or legalese) as a *register* that is used by lawyers and judges specifically for legal proceedings and that is usually too complicated for lay people to comprehend (Berk-Seligson 14). She continues by conceding that her argument is but a blanket notion that considers legalese a homogeneous *register* used for written and spoken purposes alike (Ibid. 15). For another, sociolinguist Natalie Schilling-Estes seconds this view; for her, legalese is a *register* specifically designed for intra-speaker communication, which is not eligible for code-switching (Schilling-Estes in Chambers *et al.* 375). I, personally, do not consider legal language a register of the common language, as a register should be a code

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<sup>53</sup> For example, the landmark abortion case in the US, *Roe v. Wade* (1973), could simply be cited as “*Roe*” (in italics too) for the sake of brevity and consistency.



that functions as something like honorifics in certain languages (such as Korean and Japanese), or as code reflecting a setting-based level of formality and casualness.

In the end, possibly for the sake of compromise, Tiersma decides to regard legal language as a “sublanguage”, whose definition is a “language used in a body of texts dealing with a circumscribed subject area...in which the authors of the documents share a common vocabulary and common habits of word usage” (Tiersma 142-143). This position has been seconded by at least some legal language experts (Freedman 5). Naturally, as the term suggests, a sublanguage implies that it should be treated as a subset of the corpus of the general language. Some defining traits of a sublanguage include (a) a limited subject matter; (b) lexical, syntactic and semantic restrictions; (c) use of grammar not commonly seen in the standard language; (d) unusual sentence constructions. Tiersma believes that only the category *sublanguage* would be capable of encompassing the complex language practices of the legal profession that happens to use words more exhaustively and strategically than any other profession/industry (Ibid. 143). Most of all, this will be my take on the nature of legal language, as it is probably the only category that can explain legal language as a tool for all structured speech and writing events in the context of law that, at the same time, is capable of maintaining the status of legal language as a specialized language in the context of legal translation.

Since the gap between legal language and everyday language is very wide indeed, efforts have been made to make legal language more comprehensible, while at the same time striking a fine balance between certainty and flexibility. All in all, no matter what we make of the true nature of legal language, one thing is for sure; the net result of the growing awareness of legal language as a separate and unique variety of the general natural language is the defence of it by those in the legal profession who see the need to maintain archaic vocabulary and unusual syntactic structure, which, in turn, is sanctioned by a need for precision and absence of ambiguity (Berk-Seligson 18). The need for a thorough legal language reform, such as the one advocated by the Plain English Movement, while justified in a way, comes with potential unpredictable ramifications and is still open to debate.<sup>54</sup>

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<sup>54</sup> This is not to suggest that there has been no positive result from this movement. Quite to the contrary, in fact, as noted by Tiersma, in Australia, overwhelming pressure mainly coming from civil society and the class

Of equal importance, legal translation could be a political thing (Ng in Glanert 54). The notion that people should have a legal right to full comprehension of legal documents, documents written up in professional legal language that they are forced to sign and buy into for basic survival, was what eventually led to the Plain English Movement (Tiersma 220).<sup>55</sup> This shows exactly how much legal language matters. Speech being the primary form of communication since the dawn of mankind, it is fast, transient and flowing, while writing is relatively slow and permanent. Speech and writing come with their inherent advantages and disadvantages, and because of the extra time involved, people—especially native speakers—tend to use the written form for messages that are more important, and they will likely compose such messages more carefully (Harding and Riley 13). This should not, however, suggest that speech is not to be judged by the criteria used for writing at all (Ibid.). Similarly, legal language takes at least two forms: written and spoken, meaning legal translation should take at least these two forms too. At the same time, as can be expected, spoken legal language will be more casual and informal than written legal language on the whole.

Moreover, while the term “legal translation” might intuitively draw people’s attention to the transcription and transform of written legal documents—something stable and concrete—like the constitution of a nation, parliamentary bills, wills and contracts, there is a special genre, which happens to be a form of spoken legal translation, that deserves some attention it never really received: courtroom interpretation (or “court interpreting” as some prefer to call it). Unlike the translation of written legal documents, where, in most cases, all language versions concerned—usually by law—enjoy equal authority and parallel authenticity and could thus be cited and referred to as legitimate information, evidentiary rules allows only the oral interpretation of the interpreter or any form of verbal representation in the venue’s language to be admitted as evidence—if at all—in the case of courtroom interpretation. Nowhere is the function of legal language to influence, to stimulate, to persuade and to decide is more nuanced than in a courtroom. Put another way,

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of consumers forced corporations—and then government bodies—to “voluntarily” make their documents for the lay public more comprehensible. As a result, litigation arising from consumer rights claims declined. *Vide* Tiersma, p. 221.

<sup>55</sup> In retrospect, the Civil Rights Movement, which flourished in the 1950s and culminated in the 1960s and 70s in the USA, must have had a bearing on this social movement.

in a courtroom proceeding, only what is said out loud for and to the court in the court venue's language will be afforded any evidentiary value; whatever is said in a foreign language has no bearing on the court and the proceedings whatsoever (it might not even be officially recorded in any report). Since the official court record is all that ultimately counts for the record of admissible evidence, material and exhibit, whatever is expressed in a foreign language, lamentably, will be perceived as “not counting”, or “not for the record” (Berg-Seligson 26). Sadly, a good many witnesses do not realize this. As a result, what gets put on the court record—via translation—will then be of the utmost importance, as it will be the one and only and almost final version that reflects all courtroom verbal exchanges such as party pleas, expert witness testimony and the judge's remarks...etc. Another interesting but noteworthy thing about courtroom interpretation is that whenever an interpreter is involved in a judicial proceeding, for obvious reasons, he/she would instantly become the focus of attention for everyone, despite the court's wish that he/she remained invisible (Ibid. 55). This somewhat goes against the grain of a ritual of judicial proceedings being designed to evoke the majesty of the court and the judge.

Law creates its *beau monde* through an exclusive and one-of-its-kind discourse. Unlike other specialized languages<sup>56</sup>, legal language is highly volatile, parochial and locale-specific. How so? Most scientific terminology, by contrast, is precise and specific in that concepts are well-defined, universal and value-free (Will the term *triangle* ever mean something else in geometry for another person in another language? Probably not.), whereas legal vocabulary often refers to legal and social institutions that are ever-changing (what the term *reasonable care* means depends on the time, the locale and contemporary mores) (Tiersma 109). Furthermore, most sciences, especially natural sciences, are universal and free from spatiotemporal politics and ideology in nature (the term *blood type* can be comfortably translated into French as *groupe sanguin* with minimal loss in meaning), whereas it would be hard for the legal language of one jurisdiction (e.g., *mortgage*) to cross the border into another (e.g., *hypothèque* or *ipoteca*) without at least

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<sup>56</sup> There is extensive and heated debate as to the whether there is any distinction between “general language” (or “common language”) and specialized language, and if there is, where to draw the line. For the moment, I will assume that there is, with usage and information conveyed being the two key yardsticks. More on this in detail to follow later in this paper.

some significant loss in meaning.<sup>57</sup> Berman went one step further and drew the conclusion that legal language, as a means of creating rights and duties, develops spontaneously with its meanings expanding or contracting depending on the context and the experiences of the parties involved (Berman 152). Legal language is indeed extraordinarily unique. In any case, the peculiarity and uniqueness of the language of the law has never gone totally unnoticed in judicial circles either; in fact, in the landmark legal translation case of Ireland, the *Ó Beoláin* case, which will be cited fairly often herein, one of the judges, Justice O’Hanlon cited a precedent, *Ó Murchú v. Cláraitheoir na gCuideachtaí* (1988) T.É. 112, as such:

“Had the applicant taken that advice, she would have had to undertake the inconvenience and the difficulty which would accompany the work of translation, or perhaps pay a fee to someone more qualified than herself in matters of law and language, and at the end of the day she would not know if the Registrar would be satisfied that the version presented to him would be of ‘like effect’ to the official version which is to be found in the schedule and which is available without difficulty to the person willing to use the English language version of the form.” (emphasis mine)

([2001] 2 IR 304)

What deserves a mention here about this case is that the judge noticed the fact that legal translation requires some background in law and language, or legalese, which not all native and fluent speakers of the two languages (target and source) have. Also, the judge expressly declared that two language versions of a legal text are supposed to have a “like” effect, which is equivalence, or more specifically dynamic or functional equivalence, in translation studies terminology.

In light of the various peculiarities of legal language, coupled with the unique status of law as a social norm with binding force, some considerable academic effort has gone into the determination of how the law makes sense. As a result, there have been two general and extreme views on this: the plain meaning rule and the original intention rule (Boyd 1990: 141). The truth is, in regard to the meaning of the law, legal professionals are typically concerned with the semantic meaning in their interpretation of statutes regulations and

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<sup>57</sup> Nevertheless, in all fairness, de Groot, for one, thinks otherwise. According to him, translating science would only be somewhat easier than translating other types of texts if that science happens to possess an international terminology, which, in turn, is only possible if that science, however paradoxically, has similar systems and models to describe and work out its subject matter across all languages and cultures concerned. *Vide* de Groot, 1987, pp. 795-796.

constitutional provisions (Smith 105). About this, Smith thinks that legal meaning, or the semantic meaning of legal texts, must correspond with the semantic intentions of the author(s) of some sort (Ibid.). This view seems to coincide with the original intention rule, which is also referred to as the golden rule, if we are to consider the legislator/drafter as the original author. In this sense, then, legal translation seems to have some overlap with the interpretation of law in the sense that apart from an almost useless verbatim wordplay, every act of translation inevitably involves some interpretation and judgment (Edwards 48), and legal translation, in particular, involves the translator's personal interpretation and judgement of the law/legal instrument at hand. Legal interpretation is an important subject of law, and jurists have shown time and again that there is usually more than one valid interpretation of a law—any law, and the legal translator, in carrying out his work of legal translation, will inevitably have to deal with the interpretation of the law that he is translating whether he is empowered to carry out such a function or not. This, by and large, forms the background for the symbiotic link between comparative law and legal translation. True, comparing a nation's domestic law in one area with a comparable area of law of another jurisdiction/country has become a matter of necessity in contemporary doctrinal legal research, and this is especially true in civil law jurisdictions, where academics have traditionally been given a greater say on legal issues.

As if the language aspect to legal language was not complex enough, the interpretation of the law itself from a jurisprudential or policy perspective will definitely add an extra layer of obscurity and complexity, as there are times when the referential implications of a statute are not entirely clear. The legal translator needs to get a reading out of the legal text first in order to be able to translate it into another language. Many have lamented that the judicial act of interpreting has always been shrouded in mystery, the interpretive process being treated in vastly different ways (Faigman 90). While this is true to a degree, there are, luckily enough, three general methods to help judges with the interpretation of a specific statute: the literal rule, the golden rule and the mischief rule (Ibid. 26 *et seq.*). As a quick review, the literal rule dictates that every word, term and phrase in a statute should be afforded its most primitive, ordinary and natural meaning, assuming that the best way to interpret the will of Congress/Parliament would be to follow this shade of meaning, for parliamentary sovereignty must be respected with the function of courts remaining judicial

(Ibid. 26). Next, the golden rule dictates that in the event that the literal rule produces a preposterous result that Parliament could not have intended, then the judge will get to come up with a reasonable meaning in the light of the statute as a whole (Ibid. 28). In other words, the judge would thus be permitted to speculate what the ancient lawmaker would have wanted. Finally, the mischief rule lays out three factors for the judge to consider: what the law was before the new one got passed; what problem, or what “mischief”, the law was trying to fix and what remedy the legislature was trying to provide, and in light of all three, the judge should interpret the statute such that the new law could put an end to the “mischief” (Ibid. 29).

All aforementioned principles and aids to interpretation<sup>58</sup> (e.g., *Expressio unius est exclusio alterius*) should be valued and relished. In much the same way as a generations-old home recipe must be followed in the original spatiotemporal context, a law may have an “objective” meaning, as some jurists believe, that is equivalent to a so-called “original public meaning”, and not to the subjective intentions of the law’s enactors (Smith 106). As a compromise maybe, some jurists, conversely, emphasize that some sort of compromise must be stricken between the original public (objective) meaning and the original private (subjective) meaning without outright favoring either (Ibid. 107). More specifically, what this means is that, of course, when interpreting a document (be it a recipe or a statute), we would care primarily about the subjective meaning of the author of that document, and the original public (objective) meaning would be helpful inasmuch as it could help us ascertain the original intention of the author (Ibid.). In other words, it should be the original subjective meaning that is given the most weight, and if all else fails in ascertaining this, then one would have no choice but to go with the objective meaning, which would almost always be more conspicuous and approachable. Going even further, I personally believe that this view would be of immense help to legal translators, who are constantly confronted with (at least) two shades of interpretation of the text at issue that are sometimes equally sensible or sometimes mutually contradictory.

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<sup>58</sup> Richard Posner refers to these categorically as “canons of construction” in his work *Law and Literature*. *Vide* Posner, 1998, 147.

Dworkin argues that propositions of law are not simply descriptive of legal history, and nor are they evaluative and divorced from legal history (Dworkin 528). While he agrees that the terms “interpretation” and “hermeneutics” would likely invoke an impression of the process of “understanding the meaning of a text” (Ibid. 530), for him, a literary text would be best interpreted if it ends up becoming the best work of art (Ibid. 531). By way of reference to art and aesthetics, centering on author intention, Dworkin brought up some useful insight into the comparison between legal interpretation and literary interpretation. As an antithesis perhaps, Posner has a different view on this. To him, the idea that a law, a contract, a will or any instrument should always make perfect sense is unrealistic at best, and foolish at worst; one should never naively assume that there could never be any surplus, inconsistency, mistakes or irrelevance (Posner 1998: 147). This would be especially true of parliamentary bills, something inevitably political.

A text (this includes a statute and a legal text) can be interpreted in more than one way, and from the perspectives of at least two individuals: the author (in the case of legal interpretation, the lawmaker or the legal drafter) and the reader (in this context, the judge or the jurist or some legal professional). Put another way, most likely, more than one reading can be made of a text—any text. I think everybody knows this. Thus, there is no one author’s intention that can be considered decisive by the interpreter. As noted by Dworkin, a judge right in the middle of a baffling case is acting just like a literary writer in that he is literally going through a plethora of literature of precedents and court opinions before reaching a decision, for which he will have to write an official document (most likely, a judicial opinion or decision which contains the holding and dictum). This perusal of legal documents from the past amounts to history reading (Dworkin 543). In doing so, he is not allowed to “make history” by striking out “in some direction of his own”; he is, however, expected to determine, in his own judgment, what the prior cases come to (Ibid.). By virtue of a hypothetical case, Dworkin concludes by asserting that the judge, who has a historian-like status now, must decide upon one of multiple possible readings of the text<sup>59</sup>, which, in his view, should be the one that provides the highest degree of identity, coherence and integrity and other artistic values to the text (Ibid.). Of course, not surprisingly, there are

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<sup>59</sup> The text, in this context, collectively refers to the whole body of all common law precedents in connection to the current case under consideration by the judge.

some attacks on this claim made by people who do not consider the law an aesthetic or artistic enterprise; the law would look more like a political enterprise to them. Besides, judges are not supposed to make or invent history; they are only allowed to interpret the history (most likely legal history) they encounter (Ibid. 544). Further, one must always be ready for some mistakes in the text; to say the least, the judge should know how to dismiss a precedent by pinpointing the factual differences instead of merely pointing out (alleged) mistakes (Ibid.). By the way, one key point raised by Faigman that touches on interpretation by way of an interpretive fact is of some relevance here. He asserts that the “enlightened” jurist should take it upon himself to, in the wake of the story as written so far and in light of the interpretation case at hand, “extend it forward in the best possible direction” (Dworkin 1982: 542). Specifically, what this means is that legal interpretation must be made in the light of pertinent facts and in the “best possible direction”, and any scientific data, insofar as it is useful and rigorous, should not be banned from being employed in a legal interpretation, even if those data are seemingly known facts, or “interpretive facts”<sup>60</sup> (Ibid. 105). Presumably in defiance of Dworkin, he claims that no matter how experimental natural science is, and no matter how correlational social science may be, either one could be preferable to the other one for a specific legal interpretation case, and the empirical data from either science should be taken into account as facts (Ibid.). Personally, I think this provides us with immense inspiration on legal translation research in the sense that legal interpretation being an inevitable part of legal translation, scientific data and scientific knowledge should be consulted to the fullest extent possible, and, thus, economic methods should not be ruled out from the description of legal translation as long as they work.

For Dworkin, things might be slightly more complicated under common law, the legal tradition where the judge’s interpretation of prior cases has a great deal to do with his own understanding of the integrity and coherence of law as an institution (Dworkin 545). Needless to say, any judge’s interpretation is based on his personal convictions and understanding—which, by the way, as he so honestly points out, cannot escape the politics of the day—and need not be shared by other judges. Moreover, it is Dworkin’s belief that

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<sup>60</sup> An interpretive fact is any statement that generally requires no evidence, such as “Racism is unfair”. *Vide* Faigman, 1999, p. 104.



even if a valid social science were available, it should probably never be used to support a constitutional interpretation (Faigman 1999: 104). This is presumably because in the USA, due to its firm belief in judicial review out of historical concerns, the judiciary (and not Congress) must be made the ultimate arbiter of what the constitution means because institutionally it is less likely to abuse the power to alter the constitution on a whim than Congress or the president (Ibid. 93).

Is there really such a thing as “author’s intention”? And if so, how much weight should we afford the author’s intention in regard to legal interpretation? These are two open-ended questions. Even if we respond positively to the first question, the inquiry will be no easy matter, as the intention, which in most cases is deeply hidden, of an author of any document, be it a story or a statute, might well be volatile and fickle, not discernible from the text itself and not even easily recalled by the author himself after a few years’ time, not to mention that no ontology has ever persuasively explained why there should exist an obligation on people like us today to defer to the intentions/wishes of our ancestors who have long passed away. This is probably what led some legal philosophers to think that only human beings can possibly *mean*, and not any objects or any words that represent objects (Smith 110). Apparently, Dworkin has reservations about the theory of author’s intention since it would amount to little more than speculation by means of statistics (Dworkin 548). And going through a pile of past decisions and judgments, which would require some mental “guesswork” each time, will be of little use in ascertaining the “true” intention of the author. Even selecting a small group “representative of all judges” hitherto would not solve the problem, as exactly what judges should be selected for sampling would per se be a preemptive interpretation of something that is to be interpreted, not to mention that a hypothesis of spontaneity in those judges selected as samples would also be close to impossible (How do we know that all those judges rendered their judgements spontaneously and not out of deference and reverence to their prior precedents?) (Ibid.). Dworkin concluded by conceding that politics, law and art are somehow united in philosophy (Ibid. 550).

In more specific terms, the conflict between these two interpretive methods (originalism and interventionism) are at the crux of many a legal interpretation, especially constitutional

interpretation, which often occurs in the course of a judicial review. Moreover, the two views, along with the contradiction they cause, accentuate the contrast between originalism and non-originalism, which, in turn, has a subtle impact on the contrast between interventionism and non-interventionism (Maltz 1994: 18). While these are all mainly constitutional law tenets, they do indicate how complex the language of the law is and, also, how capricious something like figuring out what the original drafters were trying to state could be. In turn, this may have unpredictable ramifications in the translation of law, especially when the law is expected to be made and held in line with widely accepted thinking of the day via legal interpretation, with or without judicial review (Kempin 17).

More recently, perhaps in an effort to quell the conflict between originalism and interventionism in regard to who gets to supply meaning to a text being interpreted, there emerged a third view: textualism, the view that meaning comes not from speakers or authors but instead from language itself (Smith 113). Semantic meaning, according to textualists, is supplied by linguistics conventions, or “the laws of language”. Needless to say, not everyone subscribes to this view, as some people prefer to believe that while conventions may reflect or represent the most common patterns as featured by speakers, listeners, readers and authors, only human beings, not inanimate objects, or even animate objects like animals, would ontologically have the property of being able to mean (Ibid.).

#### **E. Legal Translation in the Intertwined Context of Bi-/multilingualism and Bijuralism**

A few decades ago, Gérard-René de Groot once asserted very clearly that the legal translator must be armed with good knowledge of the legal terminology of the language in which the information was originally conveyed and also with of that of the legal language of the target language (de Groot 791). This is probably the first piece of academic writing on legal translation that acknowledged the importance of being bijural, in addition to being bicultural and bilingual, on the part of the legal translator, and it probably did not happen by chance, as de Groot was one of the pioneers who tried to make legal language uniform at the international level by way of the development of a “metalanguage” of law capable of conveying legal terms that were typically defined by individual national laws. Apparently, it is impossible to translate something without understanding it first, and therefore, the

activity of legal interpretation as a means of understanding the law seems to be at the epicenter of legal translation<sup>61</sup>. Meanwhile, no legal translation can ever deserve to be called completely “true” and “faithful”, as claimed by the majority of translation theorists (Legrand in Glanert 209). This, alas, has further implications in a bijural context due to the profound differences, compatible and incompatible, reconcilable and irreconcilable, involved between the two legal traditions/regimes concerned. True, there are a few legal translation theorists who propose a functional approach to legal translation, arguing that the equivalence in legal effects in the two target languages should take priority—and not formal textual equivalence (Šarčević 332), and this position would only further confirm the need of a bijural quality in the legal translation professional. As an extension of this, how could the translator possibly know what two legal expressions will yield the same legal effects in their respective languages/cultures unless he is well versed in both legal traditions (as well as both languages, of course) by way of comparative law?

However, in any case, legal translation is necessary especially in a context where bilingualism and bijuralism coexist and not bothering to translate law at all is not really an option for the pursuit of justice today because:

1. Multilingualism, as a policy adopted by the EU, depends largely on the ability—and competence—on the part of legal translators to produce reliable legal texts. This is especially true for an officially multilingual jurisdiction like the EU, where all parallel versions of a legal instrument are treated as equally authentic and respect for all cultures and languages is taken for granted. Other bi-/multilingual jurisdictions include Hong Kong, Switzerland and Canada, each unique in its own way. In each of these jurisdictions, all local laws and regulations need to be made available in every official language, with each language version given equal authority and authenticity, with a view to creating a sense of belonging for every citizen regardless of their native language.
2. Communication is absolutely indispensable in a national, supranational and international context (Šarčević 270), and legal translation would be one of the

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<sup>61</sup> Of course, legal interpretation is a separate topic that has several aspects to it, with the “understanding the law” part being just one of them.

preferable ways of doing it since it holds the constituent groups/communities together in divided societies. Only through translation can law, or a *law*, transcend borders and cultures; it is legal translation that guarantees the free movement of law, as it is a way of facilitating dialogue among all communities/groups. Most simply put, the law works as the “glue” towards social cohesion (Cameron and Simeon 12).

3. If the law is to earn universal respect and obedience, then it must be capable of guiding the behaviour of its subjects (Raz 1979: 214). Therefore, the law must be made readily available and accessible to the citizenry, in the sense that it is intelligible, clear and predictable to the fullest extent possible to everyone affected by it—adversely or beneficially (Bingham 2010: 37). Here, the term law should be understood in the broadest sense covering, among others, the constitution, parliamentary legislation, ministerial regulations, police orders/reports, regulations of limited companies, conditions imposed in trading licenses, some of which sound more familiar than others to the lay ear (Raz 1979: 213). What this means for the legal translator is that all legal transactions and legal relations, especially those that come with extremely hefty legal obligations and grave legal consequences, must be laid out in black and white for everyone to understand, access and follow. This is unquestionably one very important aspect to the rule of law, which ultimately has a bearing on the existence of law itself without becoming the ultimate goal of any law (Raz 223).<sup>62</sup>
4. The translation of law *in se* is an act of conformity to the rule of law. There is the golden axiom in legal circles *Nulla poena sine lege*, and not only should there be no penalty without a law clearly so dictating a law that is not presented in a clear and intelligible way is not to be considered law in the real sense. The rule of law, one of the major virtues the law should possess, is more than just about laying down purportedly principled rules for citizens to follow. While I am not ready to accept unconditionally the extreme view that only the reader (and not the author)

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<sup>62</sup> As a matter of fact, the link between the rule of law and the law itself are just like that of a matter and an antimatter. While the law, however well-intentioned, inevitably creates a danger of arbitrary power, the rule of law is a mechanism designed to minimize the danger created by that law. Moreover, conformity to the rule of law is no guarantee of virtue or justification in the law *per se*. Therefore, the rule of law is referred to as a negative value with only *prima facie* force by Joseph Raz. For details, refer to Raz, pp. 224-228.

“supplies” the key meaning to a text, the average citizen being the “reader” of the law, who happens to be the last link in the communication chain, must be able to bring to and take away some meaning from the communication in order for the text (in this case, the law) to take effect (Smith 118). Thus, legal translation, the process that provides the reader (in this case, the average citizen that the law is supposed to dictate) with that opportunity, would be a *sine qua non*.

5. It is a basic human right in the sense that language rights<sup>63</sup> are a vital aspect of human rights. All citizens have equal rights of access to justice, but it goes without saying that the wealthy and mighty in society are often in a better position to take advantage of the legal system. To guarantee each and every citizen equal access to justice, regardless of ethnic origin, native language, gender, age among other socio-economic factors, two key initiatives have been created: legal aid and community law clinics (Fitzgerald and Wright 107). There has been a prolonged struggle for language rights as a human right in the USA, Owing to the status of English as the “glue” to the melting pot in the USA today, many people are forgetting that up until as recently as a century ago, many states were fairly bilingual. Ohio and Pennsylvania were two states where German was so widely spoken that they were considered *de facto* bilingual states by outsiders (Del Valle 11). To this day, it is impossible to overemphasize the place of Spanish in the everyday lives of average Puerto Ricans (Ibid. 21). Language rights activists lament that language rights law has yet to develop into a known area of law with its own jurisprudence, and, as a result, one would have to refer to isolated cases scattered throughout common law for a solution (Ibid. 5). These cases include *Meyer v. Nebraska*<sup>64</sup> for due process and *Hernandez v. New York*<sup>65</sup> for equal protection (Ibid.). Apparently, comprehensive legislation on language rights is still largely absent in the USA. Legal translation, on the other hand, serves the same purpose as (ideally) language

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<sup>63</sup> The term “language rights” is always plural because, as a concept, language rights involve an enumeration of the occasions when people are entitled to use their original languages. These occasions range from purely private circumstances (at home) to purely public ones (in national legislatures), with many intervening points in relation to support for language communities. *Vide* Macmillan, 1990, p. 532.

<sup>64</sup> 262 U.S. 390 (1923)

<sup>65</sup> 500 U.S. 352 (1991)

rights legislation in that it can help keep the most linguistically vulnerable sector of society from staying out in the cold.

6. From the perspective of the rule of law, courts, as a principle, must be easily accessible to all, and a lack of legal translation would be tantamount to a long delay and excessive court costs that will likely defeat the point of having any law at all in the first place (Raz 217). Even in the US, some states have gone as far as to stipulate such right in their laws/constitutions. New Mexico's constitution (Art. 2 §14), for one, guarantees that any defendant in a criminal case has the right to have his charge and testimony interpreted to him in a language he understands. California, for another, has a similar constitutional provision that provides that "a person unable to understand English who is charged with a crime has a right to an interpreter throughout the proceedings" (Art. 1 §14). If democratic politics is, as some political scientists claim, vernacular politics, then a democratic judiciary should be able to provide a vernacular judicial procedure, in which the average citizen feels comfortable proceeding as a party to a legal action in their mother tongue, and the effects go far beyond procedural justice, the justice of means, rather than ends. And hence the Latin legal proverb *Fiat justitia ruat caelum*.
7. It is something stipulated by law. For the sake of procedural justice, in the state of California, the right of a non-English speaking defendant to an interpreter in a criminal case was established by the case of *People v. Annett* (1967: 251 Cal. App. 2d 858) (Berg-Seligson 28). Real-life cases are many, with Gary Mann's case of 2004 being one of them, which more or less highlighted the need for a new and effective law in regard to a fair trial for all (The European Union Directive 2010/64/EU of the European Parliament and of the Council on the right to interpreting and translation in criminal proceedings, which all member states were required to implement by October 2013, so provides). Together with principles like "The law must be fairly applied in each case" and "Everyone has the right to unbiased treatment by courts and administrative agencies, "Everyone has the right to be heard and to defend themselves before a judge" (what Canadian lawyers call "rules of natural justice" and what is referred to as "due process" in the US) have

been an integral part of procedural justice (Bickenbach 211). While, true, new rights and standards created by lawmakers and judges are sometimes slow to transform people's everyday lives the way that law/court decision was meant to, we should not jump to the bold conclusion that such laws have no effect; instead, it simply means that the relationship between law and life experience is very complex and, thus, requires careful review and patience. Paradoxically, at the same time, in relation to language rights in a legal proceeding, we should also stop trusting the "glamour" of law without any reservation, as situations where it is invoked are relatively rare, and some parties would go out of their way to avoid any contact with the law even in cases of extreme unfairness (Engel and Munger 11).

8. There is a great deal at stake in addition to the vindication of legal rights on the part of the most vulnerable, and this includes international trade and commerce and international exchanges (cultural, military, academic, tourist...), thanks in part to globalization. According to unofficial statistics, the global market of translation in general was estimated at about 38 billion dollars in 2015, while the share of legal translation is approximately 30%–40% of it, making it a lucrative niche<sup>66</sup>. At the same time, both markets are growing rapidly, at roughly 12% year on year, and the Translation Centre for the Bodies of the EU closed the year of 2016 with a total translation volume of 746,965 pages, which represented a 2.4% increase year-on-year.<sup>67</sup> This trend will probably only intensify given the ever-increasing volume of cross-border tourism.
9. Translating the law is one way of stabilizing and harmonizing it, or more broadly, the entire legal mechanism of a given jurisdiction will be better off if laws and legal proceedings are all translated for the parties concerned. True, much as we understand that laws should be relatively stable and forward-looking (instead of retrospective), individuals and businesses should be advised of what is and is not allowed for their long-term planning (Raz 215), and legal translation would be a

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<sup>66</sup> See <http://www.economist.com/news/business/21566010-services-specialising-language-and-culture-are-demand-legal-language>. Accessed on 04 October 2016 at 08:39 am (UTC+7).

<sup>67</sup> Translation Center of the Bodies of the European Union, *Center of Highlights of the Year 2016*, p. 5.

helpful tool for harmonizing and streamlining the legal order. Only in this way can the law become a stable and safe basis for individual planning (Raz 220).

10. With legal interpretation being a political activity, legal translation, which is an essential aspect to legal interpretation, is in a position to counterbalance any abuse of political power, especially arbitrary power, which is subjected to the state of mind of the individual wielding that power (Raz 219). Arbitrary power often, though not always, goes against the rule of law, and the judiciary is probably the only venue where the rule of law overrides all forms of arbitrary power in the sense that courts are subject to nothing but stringent procedures sanctioned by the rule of law (Ibid.). By requiring that all laws (in the broadest sense) be translated into all official languages and afforded equal and parallel status in a multilingual jurisdiction, the state is effectively making a noble political statement to every linguistic community by denouncing and curbing the abuse of power on the part of the state. To put it more explicitly, by apprising citizens who speak a minority language of their legal duties and rights in a language they are familiar with instead of forcing them to learn a language (oftentimes, a legal language for that matter) at a not-so-tender age just to find out what laws they are adversely subjected to, the state and the government are both, in effect, denouncing all possible abuses of arbitrary power and, more importantly, proving to the general public their sincere dedication to the rule of law.
11. In a civil society, especially a multilingual and multicultural one, where interracial coexistence and social cohesion are basic values, legal translation can serve as a key catalyst to greater harmony through extensive contact. Reports have shown that in such a society (such as Canada, the US and the EU), the more contact that goes on across all component communities, the more likely it is that they will develop positive sentiments for each other (Cameron and Simeon 12). In a bilingual and multicultural country like Canada, egalitarianism and support for civil rights in general are crucial to the understanding of the strong support for language rights. In addition, John Rawls, an egalitarianism philosopher, was of the opinion that, for the sake of the common good, talents and resources that people possess should be



regarded as a huge pool in which those who have more than an average share get to compensate those with less than average (Rawls in Phelps 1973: 338), and in my opinion, legal translation is yet one more platform to achieve that it is technically about linguistically better off people compensating their linguistically vulnerable fellow citizens for the language disadvantage they might have been suffering, and this would bear even greater significance when the reputation and integrity of the judiciary is involved. Hence the saying “To know you is to love you” (Cameron and Simeon 12).<sup>68</sup>

The rule of law, the deliberate disregard of which violates human dignity (Raz 221), is the bedrock principle of a civilized society (bilingual or monolingual, bijural or “monojural”<sup>69</sup>), and legal translation is, without a doubt, inextricably linked to that very principle. Since the inception of *habeas corpus* (lit. ‘you may have the body’), arguably one of the first institutions in western legal history known to have served the protection of human rights from back in the 14<sup>th</sup> century, the language employed by legal documents, especially the ones that would have a great impact on ordinary citizens’ lives and freedom, started to garner public attention. However, despite the glory and prestige that it inherited from the *Magna Carta*, it eventually had to be translated into every local language of every locale. In line with the rule of adequate and equal accessibility to the law for the citizenry, all laws, parliamentary or judge-made or otherwise, must be made available for everyone coming under its jurisdiction to understand and follow. “Easier said than done” is what one might want to say about this. Something like this would be especially difficult for common law jurisdictions such as England and the United States, where court decisions, from which the *ratio decidendi* is supposed to derive, are often themselves opaque and obscure.

Thankfully, though, not many common law jurisdictions are bilingual or in urgent need of legal translation from English into another language.<sup>70</sup> In any case, all laws must, at a

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<sup>68</sup> Of course, by no means does this mean that there are no skeptics about this; there are indeed sociologists who claim that contact in itself should never be expected to resolve all conflict. They do seem to agree, however, that language laws governing translation and language use should be created for inter-community communication. *Vide* Cameron and Simeon, p. 13.

<sup>69</sup> For lack of a better word, I am using the term *monojural* to refer to a state of featuring only one legal tradition, in contrast to *bijural*. A possible alternative that crossed my mind was *unitary*, the antonym of *federal*, which, in the end, had to be rejected for obvious reasons.

<sup>70</sup> Common law jurisdictions around the world all reflect the legacy of rule by the British Empire to various extents.

minimum, be made available in all official languages for people to understand them. This is a basic aspect to the rule of law, on which other components (such as an independent and impartial judiciary, the presumption of innocence and the right to a fair trial without delay...etc) are firmly based, and hence the need for legal translation.

At a more in-depth level, categories such as dispute resolution, the exercise of power by the government as well as a fair trial guaranteed by the judiciary are all dependent on the rule of law, which, in turn, is dependent on the law being duly interpreted, understood and followed. The fact that a specific individual or government body, which must understand the details of the power entrusted to it and the rights granted to it in a language it understands, is empowered to make a particular decision simply highlights the need for legal translation. Nothing less than adequate legal translation and interpreting throughout all proceedings, criminal, judicial, administrative or otherwise, will guarantee a fair trial and, in turn, equality before the law, in a systematic, consistent and cost-efficient way. This is especially true in cases where the authorized body/individual is granted a near-absolute scope of discretion (like a traffic police officer issuing parking violation citations). As regards dispute resolution, which is one of the major goals of the rule by law, in a modern and democratic country, means must be provided for resolving disputes that the parties themselves are unable to resolve on their own without prohibitively high cost or unnecessary delay. Even though this all-too-familiar principle seems to refer to the speed and cost of official dispute resolution for the parties, if conventional wisdom is any indication, it is actually the noble logic behind it that engenders a sublime and unspoken rule: justice should be always readily available for all for all to want to uphold it. In this sense, then, legal translation should not only be available for parties who do not understand the language of the venue, but it should also be provided to them (if required) for only a nominal fee, if not completely free of charge. As Bingham puts it in the form of an analogy, because the fair and timely resolution of a dispute is so fundamental to human rights that a judicial system may not be considered complete and fair if it cannot guarantee that.<sup>71</sup> By the way, by “rule of law”, a concept vis-à-vis rule by man, I am by and large referring to these ideas: the supremacy of the law, universal and impartial application of the law, no one is

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<sup>71</sup> His irony “Justice in the UK is open to all, just like the Ritz Hotel” was supposed to make his point. *Vide* Tom Bingham, *The Rule of Law*, Penguin, p. 86.

above the law; equality before the law; good governance by the government; equal protection of rights, among others.

Another point of reference for an argument for legal translation would be legal aid. Legal aid, as it is presumed, should be provided to anyone who is financially unstable and in need of legal protection at the same time; some even believe it should be offered by the state as a matter of principle (Bingham 87). Despite the potential cost this might entail, legal translation for the linguistically incompetent is akin to legal aid in the form of a government-sponsored legal aid scheme for the needy, if the goal of timely and affordable access to the judiciary through a fair trial—however elusive—is to be upheld. Of course, a fine balance between governmental resources and the idea of justice for all, poor and rich alike must be stricken.<sup>72</sup> Moreover, in regard to parliamentary sovereignty, members of the legislature, whether at the local level, the national level or the supranational level, should be given the right to debate and express their opinions in their own language, or in any language they prefer, free of worry and threat and under the auspices of parliamentary immunity.

True, these are all promising aspirations, but aspiration alone does not mean much; their actions will entail the need for legal translation in the context of the EU. And as Lord Bingham pinpoints quite emphatically in his work *The Rule of Law*, which I totally see eye to eye with him on, in a world of many different races, nationalities and religions, the rule of law is probably the “greatest common factor”, the closest we could possibly get to a “secular religion” (Bingham 2011: 174). And effective, timely and affordable legal translation just might help us achieve that.

It was once claimed that law is religious in its origin (DiMatteo 1998: 75). While I personally am not ready to accept this line of argument just yet, I do believe that the law is a unique and eccentric (perhaps even idiosyncratic) social institution, which, in turn, would make legal translation, the practice of the translation of law, not as straightforward as many

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<sup>72</sup> Of course, legal translation in general will always cause a burden on a court case no matter what. In light of the increase in number of official languages from EU’s several enlargements, Bingham, while never downright denouncing the need for legal translation, seems to suggest that the translation requirement does contribute to the already heavy caseload on the part of the Court of First Instance (now the General Court (EGC)). *Vide* Bingham, p. 89.

people think. As a form of specialized language translation (SLT) that touches on language for special use (LSU), legal translation is truly challenging, and here is why:

1. The complex relationship between law and culture because of a potential conflict between a judicial regime and the socio-political context in which it functions. Thus, translating a law that is tailored for one culture into the language of another culture, in which many institutions, terms and concepts simply do not exist, would be a formidable task. Not to mention how much more difficult it would be for the “exotic” law to be accepted, implemented and enforced in the target culture.
2. Seeing law as a means to achieving socio-political ends, comparative law scholars realize that not just tangible legal rules that are being promulgated and implemented need to be subjected to comparison, but also the relevant legal tradition and the collective identity that come with them. Legal translation plays a vital role because of the difference in inherent and irreversible values that are embedded in the local culture and, by inference, in the local law. The insurmountable divide between and among all existing legal traditions worldwide—and sometimes even among different jurisdictions within the same legal tradition, which may or may not have to do with the culture and history of the jurisdiction concerned.
3. The target text of a legal translation is *in se* a legal document that comes with inherent and tremendous legal effects; even a misplaced punctuation mark may wreak havoc for a government agency or a business in its regular dealing with their clientele. Also, at least in officially multilingual jurisdictions, all language versions are supposed to be equally authentic, with no one version prevailing in case of ambiguity. As a result, there can be no room for error, or even for ambiguity, when it comes to legal translation, and this will, in turn, require a rather high degree of diligence and prudence on the part of the legal translator, who is effectively a legal document producer.
4. When legal texts are the object of translation, the process requires special care as legal texts feature a unique communicative function—typically very subtly—that is often overlooked (Šarčević 2000: 189). As a consequence, subject matter

knowledge, and not native speaker fluency, is key to an adequate legal translation, as studies have shown (Rückert 13). In fact, legal translation is possibly one of the few forms of translation where translators translate in both directions since accuracy is usually preferable to native-like fluency in the target language (Ibid.).

5. The unspeakable but omnipresent interrelation between legal tradition and language is very hard to pin down. Is English inherently a “common law language” while French and German are inherently “civil law languages”? What about Arabic, Russian, Japanese and Chinese? Are they supposed to be, respectively, an Islamic law language, a socialist law language, a civil law language and a traditional-Sino-socialist law language<sup>73</sup>? For the purpose of simple analogy, can one call Christianity an inherently “western” religion simply because the two testaments of the Bible were originally written in Hebrew and Greek respectively, while considering Islam an inherently “Arabic” religion that can only be fully expressed in nothing but Arabic? Admittedly, the Bible has an Arabic version, and the Quran has an English version to it, but this does little to resolve this dilemma.
6. Unlike film translation and video game localization, both of which aim to serve the purpose of enjoyment and entertainment for the target audience, legal translation typically concerns rights and duties as designed and governed by the rule of law, and legal translators are usually given far less latitude in their line of work and are, instead, expected to adhere to the “spirit” of the law, the legal document or oral testimony at issue. Thus, legal translation, which is supposed to reflect justice and equity, may not be treated as a form of “transcreation” (Munday 154).
7. Legal translation inevitably involves legal interpretation—however subtly. Legal interpretation, as it is known in legal science, is a highly complex and sometimes controversial subject. As Dworkin noted in his paper *Law as Interpretation*, interpretation as a method of legal analysis is nothing new, but what is less known is the fact that the translation of law, written or spoken, will inevitably require some

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<sup>73</sup> Admittedly, this list of mine is far from exhaustive and the language and legal tradition pairs are not entirely reflective of the actual status. There could be anywhere from 3 to 12 legal traditions around the world depending on which comparative law jurist is being asked, and, at the same time, there can be as many legal regimes/polities as there are political entities in the world.

interpretation of the text on the part of the translator, and such “legal interpretation” may or may not coincide with the common form of legal translation, which is conducted by judges and other legal professionals. This adds an extra challenge to the legal translator’s job. Of course, given the right circumstances, the two activities might be able to feed into each other.

Multilingualism has more than one shade of meaning, and what it implies can vary by geopolitical location. While multilingualism *per se* may conjure up a bright and sunny image for many, it may cause a problem for due process of law if it compels legal translation, and the reasons are many. Law and society scholars have long been skeptical about the general claim of equal treatment for all, often citing real-life examples as to how law gets complicated by the social context (this includes the language situation involved) in which legal principles must be honored (Conley and O’Barr 1998: 12). The truth is, multilingualism is the natural way of life hundreds of millions of people around the world—they exist even in officially monolingual countries/jurisdictions. By simple inference, with about 5000 languages currently in use spread across about 200 countries around the world, there must be a high degree of bi-/multilingualism taking place, despite the occasional government policies in denouncing or demoting it (Crystal 360). Currently, in many places around the world with a sizeable migrant population, the ability to and/or actual practice of speaking more than one language (typically with at least one being a non-native one)<sup>74</sup> has become a double-edged sword that can cut both ways, sometimes to the advantage of the bilingual immigrant and at times to their disadvantage.

As if the political and social implications associated with bilingualism were not complicated enough, bilingualism actually takes more than one form, depending on the metrics and criteria selected for reference. At the most basic level there is elitist bilingualism and folk bilingualism (Harding and Riley 23). In regard to elitist bilingualism, as a case in point, bilingualism (especially the type that involves certain languages) is a hallmark of the upper classes in some locations, such as the British monarch and the

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<sup>74</sup> Please take note that I am not suggesting that bi-/multilingualism is rare. In fact, surprisingly, bilingualism, if it is to refer to the ability to speak two different languages, is by no means rare worldwide. Also, bi-/multilingualism is typically a matter of degree, with bi-/multilingual speakers placed on a continuum. What might be relatively rare is ambi-bilingualism, which denotes equal proficiency in two languages to the same extent. *Vide* Harding and Riley, *The Bilingual Family*, Cambridge University Press, 1996, p. 27.

Russian aristocracy (pre-1917), where French is/was the preferred second mother tongue. In addition, a distinction should be made between a bilingual person and a bilingual society, as it is possible (at least in theory) to have a bilingual society in which each member speaks but one language (which can be referred to as “official bilingualism”), and it is just as possible to have a large amount of bilingual individuals in an otherwise monolingual society (in which case it would be a case of “individual bilingualism”) (Ibid. 29).

As a general rule, multilingualism, which is usually one aspect to a larger movement of language planning on the part of the state, can be carried out for social, cultural, political and/or economic purposes (Clyne in Coulmas 304). The EU, as a supranational entity *sui generis*, understandably, has to treat multilingualism in a very special light. While we are all aware of the pacifist and egalitarian claim that regional diversity will strength national unity, in real life, it is not always so simple. In the context of the EU, a claim such as “bilingualism is a matter of degree”, while true, would probably not sit well with some people who may consider it a sign of weakness;

Legal translation in the context of bijuralism would be problematic due to the relative lack of rigorous academic research on it. Legal constructs as simple as “liability”, “fault”, “damages” are seemingly based on concepts that appear universal across all human languages, but, in reality, the basic concepts of the rights and duties of a member of a group or community are deeply woven into the fabric of language (Gibbons 3). Furthermore, when one consider collectively custom, tradition and formal legal codes<sup>75</sup> with linguistic diversity (be it with official languages or regional languages with semi-official status), bijuralism helps us to understand and maybe even analyse the manner in which diverse peoples within a single country envision their specific relationship to all applicable laws. Since most bijural jurisdictions around the world feature more than one official language, legal translation will most certainly help us achieve this.

Let us have a look at the case of Quebec. Quebec, as a civil law jurisdiction in Canada, was predominantly francophone when it was ceded to the British from France. To effectuate the

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<sup>75</sup> Bijuralism may take the form of a combination of a formal legal institution or a legal regime and an indigenous customary regime, such as in Australia, where common law coexists with various aboriginal customary practices that have won some legal recognition. Of course, in this sense, there would be much more bijural countries/jurisdictions than ever expected.

assimilation of French-Canadians as quickly as possible, Lord Durham advocated that the imperial parliament pass a bill uniting Upper and Lower Canada under a single parliament. Lord Durham's plan was that the French-speaking population of Lower Canada would forever abandon their French-Canadian identity once they were subject to the English majority. Interestingly and ironically, Lord Durham's plans were completed not in Quebec but in Louisiana, where French legal culture and the French language were preserved despite the transfer of sovereignty of Louisiana from France to the United States in 1803. Apparently, the people of Louisiana preferred to keep the civil law tradition for the source of their substantive private law. Moreover, when Louisiana became a state in 1812, most schools were bilingual, and its first constitution required that all laws be promulgated bilingually. In fact, it was not until after the breakout of the Civil War, during which Louisiana was clearly on the side of the Confederates, that protections for the French language were removed from the constitution (Del Valle 16-17). Because of the Americanization of the areas of public, procedural and criminal laws of Louisiana, Louisiana became legally a bijural jurisdiction. As a result, the mixed character of the legal system in Louisiana, together with the gradual but steady influx of English-speaking Americans, resulted in a slow but steady elimination of French law, language and customs in Louisiana. Moreover, the harmonization of language and law in Louisiana managed to facilitate the assimilation of Louisiana with the rest of America in a manner that the French-speaking population was incapable of perceiving or halting (Ward 1132). Thus, as it turns out, Louisiana and its mixed legal system provided the perfect model for the eradication of a minority. Indeed, the benign manner in which Louisiana's mixed legal system facilitated the assimilation of the French-speaking population of Louisiana into the American fold was exactly what was needed in Canada where the Francophone population remained resolutely opposed to the adoption of English language and law (Ibid.). Today, Louisiana's legal scholarship is still entrenched in the same "French versus English" and "civil law versus common law" debates that have colored the legal history of the state. University instructors and students alike learn to admire the beauty of the civil law tradition as well as the uniqueness of Louisiana's bijural legal system. This is, of course, a great—even ironic—contrast to Lord Durham's personal understanding of the civil law tradition, which, even more ironically, actually contributed to the assimilation of Louisiana. In an



effort to quell the unrest, which was incomprehensible to him at first, in Quebec since its annexation by Britain, Lord Durham soon realized that the root cause of the unrest was not political but ethnical and nationalistic. He was then convinced that the root cause of all conflicts—in language, religion, custom and law—between the two communities all boil down to one thing: deep animosity between Francophones and Anglophones over how power was shared. Having identified the source of unrest between the two peoples, Lord Durham decided to assimilate the French-speaking population by “civilizing” and Anglicizing them with British values and substances. The self-satisfaction among the British and the jealousy among the French resulted in intense animosity between the two communities that was about to render the province of Quebec ungovernable. Now, it was obvious that the assimilation of the Francophones of Lower Canada was crucial to effective and sustainable British rule. Finally, in light of the insurmountable barrier to the smooth administration of justice, Lord Durham realized that any rapprochement would require the domination of one of the two cultures (English or French?) in the whole of Canada. Now the question becomes: How is this kind of assimilation to be achieved? Surprisingly, Durham, who at one point was decrying the “backwardness” of civil law and French culture in general, advocated a slow but gradual assimilation process over several generations. He achieved this by encouraging emigration of Anglophones to Quebec, while maintaining the status quo of the French legal tradition and the French language, which were to coexist alongside the English language and common law (Ibid. 1141). By virtue of natural selection, linguistically speaking, the French-speaking population will be outnumbered by the English-speaking population, and so will the French language by the English language; legally speaking, with a bijural legal system, the civil law tradition, which was thought to be archaic and obsolete, would have to come head to head with the more progressive common law tradition, and the victors in both cases could be predicted. Contrary to popular belief, the initial incentive behind Louisiana’s civil code project actually had more to do with resolving the confusion surrounding the state’s legal system that resulted from the awkward merger of Spanish law and French law that was further aggravated by the abrogation of any law coming into conflict with the constitution of the United States (Ibid. 1143).

What is noteworthy in the two cases of Louisiana and Quebec is the fact that only the category of substantive private law remained within the civil law tradition, with almost all other categories, which includes public law, procedural law and criminal law, “defecting” to the common law tradition. This was by no means coincidental. Indeed, Louisiana was a success story of how two diverse legal traditions could coexist through a merger of both legal systems into one body of law. By harmonizing the two legal traditions and “getting the best out of both worlds”, Lord Durham demonstrated how Louisiana’s dual system managed to prevent the two colonial powers of the French and the British from forcing their own laws on each other (Ibid. 1144). Surprisingly and ironically enough, it was presumably because of the sense of superiority among the British towards the French that civil law and the French language were allowed to remain and be conserved, as pointed out by Ward:

French inability to comprehend due to feeble-mindedness, increased emigration of Anglophones into the colony, and acquiescence of a bijural and bilingual society, Lower Canada could, following the Louisiana model, establish a system that maintained stability while simultaneously ridding the state of the plague that was the French language and civil law. (Ward 1146)

Since the very beginning, in all judicial proceedings, both languages were used on a regular basis, but eventually Louisiana society had become predominantly Anglophone and more ethnically diverse over the centuries since statehood, any segregation on the basis of race and language became less pronounced day by day. To this day, as we have observed, in both Quebec and Louisiana, the bijural nature of the legal regime is a source of pride in their respective countries. Of course, since the bijural legal system was a deliberate choice made by the people of Louisiana as expressed through their legislature which was, luckily, honored by the state and the union, there was never any social unrest in this respect. Subsequently, in Louisiana, the bijural nature of the legal regime became a great source of pride, something that made Louisiana original within the American republic, which deepened the desperately needed solidarity and unity of the newborn republic through bijuralism (Ward 1147).

Today, notwithstanding the loss of the French language in Louisiana, the civil law tradition is alive and well despite some minor erosions of civil law by common law, and, as such, it remains solidly entrenched in the civil law tradition. And we owe it all to the bilingualism and bilingualism policies in the two civil law jurisdictions in North America.

## **F. Comparative Law and Legal Translation**

Given the spatially and temporally exclusive nature of laws and regulations, one could be forgiven for assuming that the comparison of laws and legal regimes is a thing of contemporary times, while, in fact, the comparison of law, at least in their geographical diversity, is “as old as the science of law itself” (Merryman *et al.* 28). Paradoxically, though, the development of comparative law as an area of academic inquiry was relatively recent, with its methods and aims systematically studied and its name *droit comparé* firmly established (Ibid.). For a long time, law, as a social science, was devoted to ascertaining the nature of law through the compilation of positive laws, and local law, canon law and customary law were all told to take a back seat. In any case, whatever reason was behind the neglect of a serious comparison of laws across a spectrum of nations by most scholars, we should now focus on the objectives of comparative law as an academic endeavour.

Why compare legal systems from different jurisdictions that are not even related to each other at all? At a minimum, at least for the EU, the answer is rather obvious, as harmonization of all 28 legal regimes (there are as many legal regimes as there are member states) across the EU is preferred—and even in some cases, required—by EU law. But this explanation barely scratches the surface. In more realistic terms, the primary objective of comparative law is to convey to the law student a better understanding of all legal concepts and terminology that will eventually provide him with a tighter grip on law in general (Merryman *et al.* 29). Amongst the main possible reasons for comparison is the discovery of an opportunity for a legal transplant. Through comparison, one legal system is compared with another against a range of parameters, and ideas for a new law through imitating and borrowing might occur. Legal transplantation is the activity of borrowing legal rules and institutions from one legal system by another.

Actually, legal transplants are not something new; they have been around since the days of Justinian the Great, the Roman emperor who facilitated the export of many legal ideas from Rome to every territory under his reign. Conceivably, legal transplantation is typically associated with political power wielded by wealthy and powerful empires vis-à-vis smaller political entities. In short, as with the case of legal translation, there is unquestionably some power play going on in the course of legal transplantation between the source and the recipient—only this time, the power play occurs between two governments/countries instead of between two individuals/corporations. In addition, as comparative jurists note, assistance to international lawyers who prepare draft treaties and conventions especially in the areas of international sale of goods/services, international aviation and navigation, merger and acquisition of multinationals and international currency exchange, as well as policy development and formulation based on foreign models are also on the list of objectives of comparative law (Ibid. 30).

As the respected judge-jurist Oliver Wendell Holmes once claimed, all rules of law presuppose a certain state of facts to which they are applicable (Faigman 99). This is why legal transplants—a major topic in comparative law—sometimes fail, as we have seen throughout history. The success of an intended legal transplant depends on the compatibility of the imported rules to the legal environment in which they were transplanted, with the institutional and legal infrastructures of the recipient jurisdiction being the most significant factors (Alshorbagy 238). For its part, because of Egypt's colonial history, French law has been a key source for Egypt's legal development since the beginning of the codification of Egyptian law, and, as such, legal transplantation has greatly contributed to Egyptian legal development not only on the individual law level but also in terms of the entire legal system (Ibid.). However, that being said, there have been many cases where the import of a law from France into Egypt did not work very well due to institutional incompetence on the part of the receiving country, notably in the controversial establishment of the Egyptian Financial Supervisory Authority (EFSA), which was supposed to be the main market regulator and supervisor in Egypt (Ibid.). Of course, this was the result of a combination of factors, which included Egypt's lackluster legal infrastructure—among others.

As leading comparative law scholar Alan Watson duly notes, legal transplantation is probably the most fertile source of legal development (Watson 1993: 95). Some argue that few concepts in legal scholarship have enjoyed such a remarkable career as the concept ‘legal transplant’ (Engelbrekt 112). With the term itself acquired from the field of anatomy and surgery, the legal transplant metaphor has been successful in conveying a fiery image of law as a quasi-organic substance, to the advantage of any human attempt to make laws and legal institutions rooted in one particular legal and institutional environment work outside their natural habitat (Ibid.). For legal transplants, the act of borrowing is typically the simplest part (Watson 1996: 335). Then building up a theory of borrowing on the other hand, seems to be an extremely complex matter, as receptions come in all shapes and sizes: from taking over single rules to (theoretically) almost a whole system (Ibid.). However, as Watson so rightfully laments, students and scholars are hesitant to accept the obvious fact of massive borrowing and to consider its implications, often being in total denial of the scale of borrowing and of legal autonomy. In passing, at some point, I came across a paper by Ioannis Lianos entitled “*Lost in Translation*”? *Towards a Theory of Economic Transplants*, where the term “economic transplant” has been incorporated into the legal discourse by an act of translation performed by an organ vested with the authority to adjudicate and capable therefore of producing an impact on the interpretation of legal norms (Lianos 27). The title was not all that caught my attention. Essentially, for Lianos, anything that has an economic aspect to it that is being introduced into a new society/regime (such as a breakup of a monopoly or an oligopoly) could be the subject of an economic transplant. By viewing law and economics not just as two different academic endeavors but also as two distinct “languages”, the author points out how important—and also confusing—it is to integrate law and economics in conjunction with a translation studies approach. He notes how the phenomenon known as “translation” duly describes the process of integration of economic concepts in law in the form of economic transplants (Ibid. 6). And I find this interdisciplinary undertaking remarkable, and it has given me an inspiration for my next research paper.

An analogy between comparative law and legal translation was proposed by Pierre Legrand, who has been cited a few times herein. Comparative law dwells on the “otherness” of a foreign law, which the comparatist will have to describe and relate to in his own words and

in his own language (Legrand in Clark 221). At the same time, this process provides the “other” law/legal system with a chance to be heard. This crossing of boundaries is where things start to become complicated, as it is also when the violation of boundaries occurs, which the comparatist jurist is most likely to commit and yet slow to confess to (Ibid.). Admittedly, such validity claims based on ontology are commonplace in legal translation, as it is in comparative law. The practice of translation has been long considered a form of “crossing over” and “bringing across” in translation circles, not to mention the etymology of the terms *translate* or *traduire*.<sup>76</sup> Also, in legal practice, globalization, a movement underscored by the integration of Europe and the establishment of a multitude of multinational/international organizations (such as ASEAN and NAFTA), necessitates comparative law research. This has led some to think that there might be a paradox (Van Hoecke 2015: 1). This view seems to confirm the position held by some comparatists that the activity of comparison carried out in comparative law is schizophrenic, invasive and disruptive and far from innocent and righteous (Legrand in Clark 221).

What are the major objectives of comparative law? What do comparatists intend to accomplish? I think that we must clarify this before we can be in a good position to investigate the interdependent link (if any) between comparative law and legal translation. At a minimum, a problem that one’s own home system does not handle very well will often turn into a strong motivation for comparative investigation (Glendon *et al.* 7). While this humility on the part of the comparatist deserves some credit, is the grass always greener on the other side of the fence though? On one level, comparative law is probably the one subfield of law where legal translation is mentioned at all, having achieved a great deal generating information on materials that facilitate “cross-border transactions” (Ginsburg 2010: 6). While people seem to realize that legal translation requires an excellent background in comparative law for the language transfer to be successful, one of the major challenges often reported by translators of legal texts is the ability to fully understand the contents and elements of the various legal systems worldwide. Comparative law, as the observational science of law, searches for laws in the sense the word *law* is used in the

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<sup>76</sup> In many Indo-European languages, the verb for “translate” shares a high degree of overlap in etymology with their Latin counterpart, *translatus*, which means “carry over” or “bring across”. These languages include French (*traduire*) and Italian (*tradurre*), among several others.

sciences (Merryman *et al.* 31). Needless to say, whoever wishes to understand the function of law in a particular society has to study the role of law in many societies and not just in his own society (Ibid.). In this respect, comparative law plays an important role for legal translation, as it allows the translator a better grasp of terms and concepts by helping him to identify the similarities and differences among legal traditions. After all, whichever aspect of the legal system/tradition is made the focus/criterion of comparison, it will become a potential dimension of convergence and/or divergence (Merryman *et al.* 52). Finally, there is also the more utopian view of complete worldwide understanding of miscellaneous cultures worldwide through a comparative study of their laws and how law functions in their societies and how the wide gap between cultures may be closed up by way of comparative law research (Ibid. 31-32). These, arguably, all echo the purposes that translation serves for mankind as claimed by translators.

That being the case, however, researchers easily go astray when embarking on comparative law research, the main reason being that, as mentioned earlier, there is no consensus on the kind of methodology to be followed, and comparative law research, as a result, is sometimes scorned for being bland. Moreover, almost everything that was more or less established in the domain of comparative law over the last century has been sparking criticism during the last few decades: the concept of “legal family”, the possibility of comparing and contrasting systems and institutions, as well as the object of comparison...etc. In comparative law, admittedly, the most common function of comparison is description, as, for better or for worse, most descriptions made by comparatists of non-native legal regimes typically employ comparison as an important way of giving meaning to a descriptive statement (e.g., *succession* in civil law and “succession” in common law) (Merryman *et al.* 34). Worst of all, on top of all that, there is the notorious and yet ubiquitous language issue (e.g., the problem of “false friends”) that the comparatist might not be familiar with that could nonetheless get in the way. This is where translation theory comes into play.

By their own admission, comparative jurists do acknowledge that the comparative method of law involves the relationship of language to law (Merryman *et al.* 39). The language problem is both subtle and complex with no easy way out because chances are the

language(s) involved will appear exotic to the jurist, who is, most likely, monolingual and parochial.<sup>77</sup> The link between seemingly “equivalent” terms from two legal systems (and of course two languages) do not always operate mechanically one-to-one, and if a legal professional equates the Japanese legal concept *fuhōkōi* (不法行為) (“delict”) with “torts” and the French legal term *contrat* with “contracts”, then he would be little more than a “word substitutionist” who might be a better lawyer than a legal translator (Ibid.).

Conversely, the best way of resolving the law and language conflict as regards comparative law, as some claim, is by reviewing the problem first in the relatively simple setting of the home jurisdiction of the researcher (Ibid.). Polysemy is a common property of the abstract language used in laws and legal documents, and there is no need for lawyers or judges to get too excited over it, as they did not cause the “interpretational malady” suffered by a law or a legal text; they only exploit it to their advantage (Ibid.). Admittedly, the judicial process is a fundamental process during which the application and interpretation of law constantly fall victim to the inherent imperfections of legal language, and it is something democratic countries pride themselves on. Therefore, a minimum grasp of the imperfections of legal language in both legal systems (and, preferably, in both languages) is but a first step for the comparative jurist working on foreign law, otherwise any “conclusion” on what a piece of foreign legislation means presented in one’s native language would probably become more rant than reason (Ibid.).

Lawrence Friedman, a highly influential legal historian, for one, characterized comparative law as being preoccupied with the problems of translation across cultures and the corresponding search for functional equivalents<sup>78</sup>; as such, it thus, according to Friedman, “has the virtues and the faults of a dictionary” (emphasis mine) (Friedman in Clark 1990: 50). He also added that comparative law, in the traditional sense, is concerned, above all, with “issues of translations” (Ibid. 49), paving the way for a perfect foreground for my

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<sup>77</sup> Although the author, Merryman, uses the Japanese language as it is featured in Japanese law (legal Japanese and conversational Japanese are decidedly different) as an example for his argument, the central points he is trying to make would hold true for any language spoken in any jurisdiction. Hence my apparent generalization.

<sup>78</sup> Interestingly enough, this pursuit on the part of comparative law seems to correspond with that of translation studies in that both undertakings are constantly in search of a parallel category (legal concept vs. word/term) that is of *functional* or, in Eugene Nida’s words, *dynamic* equivalence. More to the point, Nida’s theory of dynamic equivalence stresses equivalence that is centered on the fulfillment of the same function in both languages/cultures.



research. So what does this mean for legal translation? It is quite simple; despite the common impression among the general public that legal translation is all about rendering legal terminology into a different language, research on legal translation should not be confined to the linguistic, interpretive or phraseological (Hendry in Glanert 88). Law, the vehicle of legal translation, is a social phenomenon through and through; it is of a social nature in origin and in purpose. Thus, it is imperative that legal translation should be linked to context and meaning for it to work as a tool for legal comparison (Ibid). Whenever a counsellor is advising his client on foreign or international law and comes across a foreign legal term that is to be translated, he must ascertain in what sense and context that legal term appears in the framework of its pertinent legal system before determining whether the “accepted” and “ongoing” equivalent would make the right choice. And even then, one must keep in mind that there are stubborn limits to legal translation. Yet, in defiance of these purported limits to legal translation, comparative legal studies has taken upon itself to fulfill the formidable task of legal translation by making it one of its central components (Hendry in Glanert 92). Of course, to a certain extent, this was never totally unanticipated, as language issues are certainly expected to arise in connection to comparative law, and the reasons are many. First of all, in the most intuitive sense, people in different countries speak different languages, and they produce legal texts in their own native or official languages that may be foreign to the comparatist jurist who is endeavouring a comparison across multiple jurisdictions against certain metrics. Of course, these texts all need to be translated before any comparative research based on a basis for comparison would be possible. Second of all, given the increasingly dominant status of English as a *lingua franca*<sup>79</sup>, both in scholarly circles and in the publishing industry, the need for legal translation (mostly into or from English) is growing at the same time (Curran in Reimann and Zimmermann 2006: 676). While this may be heartening for people who speak English either as a native language or even just as a first foreign language (L2), it puts great strain on legal translation, partly because of the asymmetry between the amount of translations into English and that of translations from English—a phenomenon termed a “hegemony”

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<sup>79</sup> The term *lingua franca* as I am using it has a slightly extended meaning; it is one that goes beyond the traditional meaning, to encompass a language common to many cultures and communities at any or all social and educational levels. *Vide* McArthur, 2003, p. 2.

by Venuti (Venuti 1995: 12) and seconded by many translation theorists (Wright in Malmkjær and Windle 245)<sup>80</sup>.

Surprisingly, despite the seeming distance and disparity between comparative law and legal translation, the two intellectual enterprises actually share a high degree of overlap. To begin with, choosing which two legal systems to compare is *in se* a statement—and a very strong statement at that, no weaker than choosing what legal texts published in what languages to translate (Glendon *et al.* 7). Then there is the concept of “interpretation” that ostensibly exists in both areas. Interpretation exists in both areas of research, and yet the term *interpretation* itself is polysemous, having different meanings and referents in comparative law and translation studies. Jeffrey Green thinks that translators are interpreters in that all interpretation requires some intuition, and without an intuitive grasp, interpretation—and, as a result, translation—will be obtuse (Green 2001: 13-14). Some have noted that it is often taken for granted in the humanities and the social sciences that *interpretation* unambiguously refers to only one well-defined activity— assigning meaning to something (Simonna s 149). Indeed, interpretation is vital, both for the purpose of understanding the pertinent legislative text as one special type of legal text (for instance, a single provision) and for the future applicability of the legal rule under consideration. The legal translator needs to understand the legal term from the source text in the source language first before he can be in a position to claim whether there exists an equivalent in the target language. Whether or not he thinks that there exists an equivalent, thorough understanding of the source legal culture and some comparison between the two legal cultures will always be necessary. Even if an equivalent is readily available, the problem still exists, since it is now the translator who must first understand the term as it is presented in the source context in the source language the original author’s message, not simply the words/phrases/terms at face value (Simonna s 2013(b): 151). In doing so, the translator is technically employing comparative law methodology without necessarily noticing it (Ibid.). In a more romantic sense, the comparative lawyer is seen by some as a cultural broker (Merryman *et al.* 42), while it is no secret that the translator has been likened to an “honest broker” by some

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<sup>80</sup> The flow from English for scientific translations is heavily conditioned by the hegemony of English as the “language of science”, as discovered by translation theorists. An estimated 80% of all academic journals with some international standing in the natural sciences are published in English.

translation theorists in that not only does he need to read the text carefully, but the reading he gets out of the text he has read will never stay private or anonymous (Green 2001: 18).

Indeed, one very fundamental comparative law perspective is based upon functionalism<sup>81</sup>, under which the basic methodological principle of all comparative law is that of functionality (Merryman *et al.* 44). Basically, functionalism, as opposed to socialism, is a down-to-earth view on everything in life, viewing inequality as normal and *functional* for society (Tovey and Share 171). In other words, under functionalism, inequality and injustice are both inevitable and justifiable, as everything is supposed to exist for a reason. What this means for comparative law, then, is that everything being studied in the name of comparative law must be presented in purely functional terms. To put this into perspective, the principle of functionality dictates that comparatists must refrain from looking at and evaluating foreign law in foreign society through the lenses of their own law and society, and any “dogmatic accretion of one’s own system” will only contaminate the truth that the comparatist is trying to ascertain (Ibid.). Hence, Ralf Michaels calls the functional method “both the mantra and the *bête noire* of comparative law” (Michaels in Reimann and Zimmermann 340). Functionalism and Marxism seem to diverge the most on class and material interests, with functionalism seeing nothing wrong with some people earning and owning more than others, whereas Marxists, in light of the material basis of production, insist that production and other work activities are determined by the means of production, and there will always be a power struggle between the class in possession of the means of production and the class with nothing but their labour power to spare, or the *proletariat*. We will revert to the labyrinth created by Marxism and capitalism by way of a contrast between the neoclassical economic view and the Marxist view in Chapter Three.

As mentioned previously, legal translation across two different legal traditions is usually decidedly challenging and risky. This has been emphatically confirmed by a large number of translation theorists. Pommer, for one, calls legal terminology “system-bound, tied to the legal system rather than to language” (Pommer, 2008: 18), and this has been seconded by Simonna s, who argues that law reflects the relevant legal culture, and there is a greater

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<sup>81</sup> Functionalism, along with Marxism and the Weberian view, are generally considered the three main perspectives of social class theory. For details, please refer to Tovey and Share, *A Sociology of Ireland*, Dublin: Gill & Macmillan, 2003, pp. 171 *et seq.*

resemblance between legal cultures that belong to the same legal tradition (Simonna s 2013 (a): 92). For another, Rackeviciene believes that absolute equivalence between legal terms from different legal systems is close to impossible, and any two “corresponding” legal terms that are found to be equivalents of each other may—at a maximum—only be highly similar in terms of function and relevance but never completely identical in every way (Rackeviciene 1-2). Each legal tradition, or even just each legal regime, necessarily has its own frame of reference not easily transferable (Simonna s 2013(b): 151). As we will see later on, this peculiarity with legal translation goes beyond the non-translatability of cultremes in general translation, and it will pose a problem for legal translators, not all of whom have adequate training in foreign law, or even in law at all. Not even the idea of functional equivalence or dynamic equivalence would do the trick. Two better terms for it would probably be “contextualization” and “re-contextualization”<sup>82</sup>.

True, there is indeed more than one approach in comparative law, and eventually, of course, it will always be the objective of the research and the research question that is to determine which methodology is best. According to Ralf Michaels, functionalist comparative law has at least as its functions understanding laws, comparing laws and evaluating/assessing laws, just to name a few (Michaels in Reimann and Zimmermann 363 *et seq.*). Understandably, if the objective is to harmonize a number of bodies of law, say, across all member states of the EU or across all 50 US states, then comparing all legal systems involved would be implied; also, the approach to take with the endeavour would be partly determined by such an objective, as the focus will be to sort out all possible similarities and differences. Functionalism will likely serve as a center of gravity for an extensive study on legal translation in the context of comparative law since functionalism has left visible traces in both areas of inquiry.

Now that we have examined the background of legal translation in the context of enterprises such as law and language, law and culture as well as comparative law, we should now take a serious look at how legal translation is to fit into the greater context of

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<sup>82</sup> These are very anthropological concepts proposed by influential anthropologists like Michael Silverstein and Alessandro Duranti. While the two terms of “context” and “contextualization” remain hard to define precisely (even for anthropologists), for this research, “contextualization” will be—however tentatively—taken to mean to set something in a particular context. *Vide* Duranti and Goodwin, 1992, pp. 2-3.

translation studies in terms of methodology, an area of inquiry that has seen numerous shifts and turns over the decades since its inception.

## **G. Legal Translation in the European Union**

### **1. Current Status of Law and Translation in the European Union**

Legally speaking, the EU remains an organization established by its member states, and, as such, it does not have *carte blanche* power to act in whatever area it wants to. Instead, more specifically, the EU only has powers that are conferred on it by the member states via the various treaties, and any power that has not been expressly handed over to the EU remains with the member states. In this sense, EU law is a legal order in its own right and with its own drafting standards and conventions—up to a certain extent.

Legal translation, as it is conducted and protected by law, has its origins in language rights—a right that is always written in the plural form. This is because, according to Canadian language rights and multilingualism scholar Michael MacMillan, as a concept, "language rights" involves an enumeration of the occasions when people are allowed to use their native languages (MacMillan 1990; 532). These occasions range from purely private to purely public with many intermediate stages in between (Ibid.). Moreover, the strength, or the extent, of the right would be another issue of debate, with some viewing language rights as rights not to be discriminated against while others seeing it as a right to live one's whole life in a minority language (Ibid.). Presumably, the latter would entail a much fuller right to legal translation.

The Charter of Fundamental Rights of the European Union stipulates that the EU must respect cultural, religious, and linguistic diversity and uphold every citizen's right to participate in the democratic life of the union, and this can only happen if information is available to all citizens in the languages they know. This is what we mean by "multilingualism", and if we believe that multilingualism and translation must go hand in hand, then legal translation is of the utmost importance to the European Union, given the supranational body's legal personality and its own legal order, which is separate from

international law; on top of that, each member state, which may or may not be bilingual or bijural, still functions as an individual jurisdiction with its own laws and judicial system, as the European Union has yet to become a supranational legal order *in se* for all member states. However, each member state does not really act on its own; European Union law does have a direct or indirect effect on the laws of its member states and, once in force, automatically becomes part of the legal system of each member state. In other words, unlike other international bodies such as the United Nations, NATO and the Council of Europe, the European Union does have a law-making function that is to be taken very seriously. In this sense, the European Union is *in se* a source of law. The legal order is usually divided into primary legislation (the Treaties and general legal principles), secondary legislation (based on the Treaties) and supplementary law. Nevertheless, scholars still lament the status of legal translation education across Europe, claiming that legal translation should be taught more systematically and more extensively (de Groot: 794).

What does it mean to make a language official? Linguists and sociologists argue that the effects and implications are multifold, ranging from the substantive (e.g., the right to use one's native language in court or for public services) to the symbolic (e.g. the acknowledgment of different groups and clans within a larger state) (Mac S íthigh: 78). In addition, official status may affect the social aspect of the language, and not just the legal aspect. It was possibly within this framework that the EU wound up with such a large number of official languages. The truth is, presumably for the sake of transparency, democracy and solidarity, the EU has a whopping 24 official languages<sup>83</sup>, whereas the UN and NATO, both with significantly more members than the EU, have but a modest six (French, English, Russian, Chinese, Spanish and Arabic) and two (French and English) official languages, respectively. On top of that, pursuant to Article 24 of the Treaty on the Functioning of the European Union (TFEU), any EU citizen has the right to use any of the official languages in correspondence with any EU institution across the entire regime, which, in turn, will have to reply in the same language.<sup>84</sup> At the same time, the Charter of

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<sup>83</sup> This includes "official" languages (once or presently) without full official status, such as Maltese and Irish. In which case it would be referred to as "under derogation".

<sup>84</sup> The TFEU, whose predecessor was the Treaty of Rome, is one of the two treaties forming the constitutional basis of the European Union, with the other one being the Treaty on European Union (TEU) of 2007, which is sometimes referred to as the Treaty of Maastricht.

Fundamental Rights of the European Union, adopted in 2000 and made legally binding by virtue of the Treaty of Lisbon of 2009, prohibits discrimination on grounds of language (Article 21) and places an obligation on the Union to respect linguistic diversity (Article 22). It, therefore, should not be too difficult to imagine how complicated the language and translation situation would be for the EU. This is one very good reason why the European Parliament has had to develop a system centered on three pivotal languages: English, French and German, into which all documents will be translated at the first stage before being further translated into the remaining 20 or so official languages. This way the European Parliament gets to reduce expenses on logistics considerably. As a side note, under the long-time policy of multilingualism, as the EU continues to expand, there will be, to be sure, more official languages emerging and more unofficial but significant regional/minority languages fighting for recognition. While it may be an excellent idea to encourage EU citizens to learn as many foreign languages (preferably European languages) as possible amidst the irreversible global trend of learning English as a *lingua franca*, it does come at a price: making best use of available resources for a multilingual Europe could prove to be a challenge.

The Treaty of Lisbon, which came into effect on 01 December 2009, was supposed to amend the two existing treaties, the TEU and the TFEU, that had acted as the constitutional basis for the EU. However, it, by nature, is an amending treaty, meaning it was supposed to amend the original texts, most significantly the texts of the Treaty of Rome. As we all know, in 2005, the people of two (France and the Netherlands) of the six founding members of the EU refused to ratify the Constitutional Treaty for Europe (TCE), and then in June 2008, Ireland, arguably one of the countries that benefited most from their membership in the EU, rejected the ratification of the Lisbon Treaty by referendum. The three major sources of the law of the European Union are the founding treaties (primary law), legislation as the product of the system's autonomous political institutions acting as a legislature (secondary law) and, finally, supplementary law, sources of law not specifically mentioned in the treaties, such as, most notably, case law (Weatherill 27). More specifically, the sources of law of the European Union are many, as presented above, but the primary source of EU law is undeniably all the relevant treaties, which are to prevail in case of conflict between an EU treaty and another source of law. Then comes the secondary

source of law, which includes regulations, directives, decisions, recommendations and opinions. The Treaties are but a framework that lays out an overall design that requires specific amplification, and this is why there is a secondary source of law. Of course, these forms of secondary sources of law are of different significance, which is covered in Article 288 TFEU. The first paragraph of this TFEU article provides: “in order to carry out the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions”. A regulation is vested with general application and is binding on all member states, and, as such, it needs no further action by any member state’s national body (such as referendum or ratification) (Paragraph 2). Once adopted, a regulation must be publicized in the *Official Journal of the European Union* (the *OJ*), the official gazette of the EU. A directive is binding in terms of the result to be achieved on each member state, but it leaves to the specific authority of each member state the specific choice of form and method to that effect (Paragraph 3). This means that, taking Ireland as an example, an act of the Oireachtas Éireann might be needed before a directive of the EU can be duly implemented in the Republic of Ireland. Finally, a decision is addressed to a limited group of people, and it is only binding on those to whom it is addressed (Paragraph 4 of Article 288)<sup>85</sup>. Finally, recommendations and opinions shall have only explanatory and declarative effects and no binding force whatsoever (Paragraph 5). Moreover, Article 289 TFEU, which concerns the usual, though not exclusive, method for legislative procedure, provides that the ordinary legislative procedure shall consist in the joint adoption by the Parliament and the Council of a regulation, directive or decision on a proposal from the European Commission.

A new legal order that is supreme and upheld by the Court of Justice is being devised by the very notion of the EU per se—though not entirely without controversy. Article 47 TEU states that “the Union shall have legal personality”, which reeks of developments towards state-building and state-replacing for some (Weatherill 647). As a matter of fact, at least at the moment, EU law—at the community level—does not belong to any single legal tradition. The EU still largely functions on treaties that form the constitutional basis of the EU. The Lisbon Treaty did not really change the nature of the EU, which, according to

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<sup>85</sup> This paragraph provides “A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them”.



some EU law experts, is still a partially federal entity (Piris 331). Essentially, what this means is that the EU is neither a international or intergovernmental organization in the conventional sense, and nor is it a sovereign state, unitary or federal (Ibid.). There are primarily six sources of law: primary sources of Community law, secondary sources of Community law, other Community acts not expressly mentioned in Article 249 of the EC Treaty, external sources which derive from international commitments of the Communities, complementary sources of Community law, and finally, general principles of Community law and case law of the ECJ (Kaczorowska 2000: 161). Now, let us have a brief view of each of them. Primary sources of Community law primarily include the three founding treaties (the Treaty of Paris, the Treaty of Rome and the Treaty of Amsterdam) along with all protocols annexed to them, and they enjoy supremacy over all other sources of Community law (Ibid. 162). Secondary sources of Community law include, in accordance with Article 249 and others, regulations enacted and directives issued by the European Parliament acting jointly with the Council of the European Union and the European Commission. These are basically unilateral acts adopted by the Council, the Commission and the European Parliament. Other Community acts not expressly mentioned in Article 249C include internal regulations, directives and opinions addressed by one EC institution to another, as well as acts outside the framework of the EC Treaty like resolutions, deliberations and communications and so forth adopted by various institutions (Ibid. 176). External sources derived from international commitments of the Communities refer to international agreements entered into by the Community with third countries or international organizations that are binding on EC institutions and the member states (Ibid. 177). Fifthly, complementary sources of EC law come from agreements between member states in areas that are within their domestic power. Finally, general principles of Community law and ECJ case law include (among others) all public international law and general principles inherent to all official legal systems, such as the principle of legal certainty, which is recognized and strictly adhered to by the ECJ (Ibid. 183), as well as general principles common to the laws of the member states (Ibid. 184).

## 2. Translation Policy and Language Policy in the European Union

First of all, there can be no language policy without an adequate translation policy (Meylaerts in Gambier and Doorslaer 2010: 229). In addition, translation and multilingualism are interconnected at the level of national language policies, and this is why governments and authorities around the world—especially democratic ones that encourage communication between the citizenry and the authorities—are in dire need of a fair and transparent language and translation policy (Ibid. 228). This is particularly important for countries with significant numbers of minorities and/or non-native immigrants. Let us now have a look at the situation of the EU. Since its inception with only six countries in 1952 when the European Economic Community (EEC) was created by the Treaty of Rome, the EU has been continuously expanding and has had to change its name several times. In May 2004, ten countries joined at once, bringing the total number of member states to 25. Two more (Romania and Bulgaria) did in 2007, and Croatia in 2013, and preparatory talks are going on with quite a few potential members and candidates, such as all the remaining successor states of the former Yugoslavia since its dissolution, Albania as well as Turkey with their full memberships in the pipeline. Most of the newcomers have managed to get their own national official languages added to the list of official EU languages, which amounted to 20 in 2006 (with three more to come in 2007 and 2008 among which, belatedly, came Irish), and then 24 in 2013 hitherto.

Of course, under the umbrella of the EU are 28 interconnected and yet separate countries, each with its own unique situation and condition. Hence, in order to be able to properly assess all implications of the use of the Irish language within the Irish judicial system in conjunction with language rights in Ireland, one would have to have an clear overview of the language itself first (Ó Conaill 17). When Irish was first granted official status in 2007, it was done so on the condition of derogation, and it was not until 2016 that it was granted full and complete official status. What this means is that up until fairly recently, European institutions were under no obligation to provide full translation or interpretation services into or out of Irish, as it does for the other 24 or so official languages. Translation is only mandatory when it comes to co-decisions made by the European Parliament and the European Council for a language that is under derogation. A date of January 2022 is projected for the termination of the derogation phase for Irish. In Europe today, yes, the

link between translation and multilingualism concern all institutions, public and private, but as studies reveal, the introduction of a fair and transparent translation policy remains one of the greatest challenges for multilingual societies today (Ibid. 229).

Maylaerts states in her paper *Multilingualism and Translation* that there exist four types of language and translation policies around the world: (1) complete institutional monolingualism with non-translation, such as in Japan; (2) institutional monolingualism with occasional and temporary translation into minority languages, such as in the USA, where limited Spanish translation is available; (3) complete institutional multilingualism with mandatory multidirectional translation in all minority languages for all; (4) institutional monolingualism at the local, lower level coupled with institutional multilingualism at the higher (e.g., federal) level, as is the case in many officially bi-/multilingual countries like Canada<sup>86</sup>, Spain, Switzerland and India (Meylaerts in Gambier and Doorslaer 2010: 228-229). Language policy within the EU falls into two broad categories: the language policy regarding the official languages of the EU and the language policy vis-à-vis the status of minority languages in the individual member states, with the latter being largely and loosely regulated by the ECRML. Understandably, regional or minority languages within a specific member state that do not enjoy any official status in that state (such as Catalan in Spain) will benefit most from the ECRML. According to the EU Language Charter (Council Regulation No. 1), each member state has the right to request that any and all of its national official languages be given the status of an official EU language. This right entails, among other privileges, that all EU “regulations and other documents of general application” must be translated into their official language(s). Also, any official EU language may be used in EU parliamentary debates and formal Council proceedings, with interpretation provided in each case into all other official EU languages. Finally, all documents are meant to be used for communication between the EU institutions and the governments and other institutions of the member states. In this sense, all official EU languages are, at the same time, EU institutional working languages, and Council

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<sup>86</sup> In Canada, in light of socio-demographic conditions, the *Official Languages Act* and the *Canadian Charter of Rights and Freedoms* supports equal official status for French and English at the federal level, while supporting the use of the minority official language at the provincial level in all provinces in the areas of federal government services. Immigrant languages, such as Hindi and Chinese, are categorically excluded. Of course, as MacMillan has stressed time and again, support for language rights—at least in Canada—is often politically motivated, and with both Anglophones and Francophones being hypocritical at times, the foundations of language rights in Canada remain largely an uncharted terrain that requires more research..

Regulation No. 1, indeed, refers to all of them as “the official languages and the working languages”. In the near future, the list of official EU languages can grow further with languages like Albanian, Icelandic and Turkish being added to the already long list of official languages, alongside the continuous enlargement of the European Union. Turkish will be able to attain official status either by virtue of Turkey’s eventual accession to the EU or because of the ultimate reunification of Cyprus, where Turkish enjoys official status alongside Greek. On the legal side of it, the European Court of Justice has long ruled that the Treaty of Rome should have direct and full application in all member states and that EU law was to enjoy primacy over any inconsistent national law of a member state. This, in turn, of course, will give rise to a yet greater need for legal translation across the EU.

Now, in relation to the language policy regarding minority languages, it is loosely regulated by the European Charter for Regional or Minority Languages (ECRML), which is a European treaty (CETS 148) adopted in 1992 under the auspices of the Council of Europe with an aim to protect and promote historical regional and minority languages in Europe. By “minority languages” here, we mean languages like Basque, Catalan and Breton, which have little to limited official status anywhere in Europe, but languages that nonetheless deserve legal protection for the sake of language diversity. In reality, however, things are not that simple, as this rule is subject to countless interpretations and is at times very hard to enforce. Language policy is often politically motivated wherever we go, and while declaring a language official (say, Irish in Ireland) may appear flattering and complimenting at first, the truth is that official status usually comes with a catch; in most cases, an official language gets highly regulated by the government, while any unofficial language, no matter how “majority” or “minority” it may be, would not be subject to the same degree of regulation. In this sense, then, official status, along with the translation policy that accompanies it, can be a double-edged sword.

While this may sound heartening and encouraging to avid advocates of national identity within a greater EU framework, truth be told, state-sanctioned translation does put a considerable strain on the current translation service bureaucracy at the same time. Even the Right Honorable Lord Bingham of Cornhill acknowledged that the burden of translation among the 23 official languages (in his times) is one of the three key reasons that have been

contributing to the lengthy periods of delay with the EU judiciary, with the average translation-related delay in each court case estimated at a good seven months (Bingham 2010: 89). Then as now, with the current 28 member states and a further five candidates waiting in line for membership, one cannot but imagine that the pressure will only get worse. Luckily, some measures are already in place for it. There is a wealth of different cultures and languages contained within the Union, and, frankly, language skills are unevenly distributed across countries and social groups throughout the EU, with some nationalities more multilingual than others and some professions more multilingual than others too. Currently, English and French are the two languages through which the EU conducts all its conferences and in which it publishes all its official reportage. German also has a strong presence in the EU insofar as many MEP (Members of the European Parliament) are able to speak it. In some cases, the EU chooses to operate through nothing but the mediums of English and French. The French have expressed a desire for their language to have a higher profile in the Union. Is it truly more beneficial to embrace and respect every language allowing all EU communication to be conducted through a variety of languages, or to insist on one single language as the medium of communication for everyone and for every context? In any case, translation at the EU's headquarters is a complicated – and often costly – business. The European Commission has three official "procedural languages": German, French and English. But with the union continuously expanding and the 24 languages now spoken across all member states, the number of staff translators has ballooned from about 200-300 to 2,000-3,000. It is estimated that the EU produces at least 1.76 million pages of translation work system-wide each year, costing a hefty €300 million in expenses. Today, estimates have put the total cost of translation for all the institutions at around 1% of the EU's annual budget, averaging roughly €2 per EU citizen.<sup>87</sup> Some have proposed that English should become the single working language of the EU. With Britain being the most Euroskepticist country and Brexit having become a reality, English as the sole official language will only contribute to the narrow-minded world and defeat the entire purpose, and as a community dedicated to being "United in Diversity" (the motto of the EU), the EU must continue to uphold multilingualism via

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<sup>87</sup> <https://www.euractiv.com/section/languages-culture/news/irish-to-be-given-full-official-eu-language-status/> Accessed on 09 September 2018 at 22:12 (UTC).

translation as promised and respect translators, especially legal translators, in order to live up to its supreme ideals.

Against all odds, Irish was finally afforded official status by the European Union in 2007 as the 23<sup>rd</sup> official language, despite its participation in the union's predecessor, the European Economic Community (EEC)<sup>88</sup>, as early as 1973. This however, would not indicate that the Irish language will be on a par with languages like English and French henceforth; it does not mean that all past legislations would have to be translated into Irish, and nor does it mean that all EU institutions and bodies are now obliged to provide translation services in Irish. It did, however, mean the creation of 29 new job openings in translation, revision and publication across the EU administration, mostly at the Translation Centre for the Bodies of the European Union (CdT), which will mean an extra cost of around €3.5 million a year.<sup>89</sup> Furthermore, as of 2022, the marginalized status of Irish will hopefully come to an end with Irish becoming a full-fledged official language on par with all other official languages such as French and English. By the way, all decisions on language regime require a unanimous vote by the European Council of Ministers, or formally, the Council of the European Union.

Apparently, the handling of the language issue within the framework of the EU is inherently a reflection of power relations among languages as well as among nations. This has been evident since the establishment of the EEC, which had only Dutch, French, German and Italian as its official languages. This should come as no surprise, for the designation of language status to any human talk as “official language” or “regional language” or “dialect” simply comes down to power politics. As a sociolinguist claims, an official language is nothing but a dialect with an army, a navy and an air force; that is the only difference from a sociolinguistic perspective (Steinberg in Burke and Porter 199). In other words, the state gets to draw the line between “official language” and “minority language”. Period. And this phenomenon will undoubtedly spill into the politics surrounding translation policy (Why bother translating an official decree, or anything for

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<sup>88</sup> In fact, Irish was never an official language in the EEC or in the subsequent European Community (EC), which was established and took over the EEC in 1993 by the Treaty of Maastricht and subsequently absorbed into the newly formed European Union.

<sup>89</sup> <https://www.independent.co.uk/news/world/europe/irish-becomes-the-23rd-official-language-of-eu-430615.html>. Accessed 09 September 2018, at 18:01 (UTC).

that matter, into a language with no official status?). Put another way, what language pairs and what texts and documents are worthy of legal translation is also, in large part, subject to state policy. No language policy or translation policy should be treated as a given. Studies have shown that translation, which includes legal translation of course, could serve as a litmus test of the rise and fall of nations and their national languages, where international exchanges have three facets: political cultural and economic (Heilbron and Sapiro in Wolf: 97). In addition, the phenomenon of legal translation, and also that of translation in general, will always be a venue where commerce and politics come head-to-head with each other, and legal translation will thus fall victim to the mechanisms of both politicization and commercialization. In the current world of international trade, a knowledge economy is flourishing, cultural goods or “cultural commodities” are surpassing material goods in terms of value, or at least in terms of symbolic value. This recent shift from a political aspect (i.e., seeing everything as an international politics power play between great empires and their languages) to an economic one (i.e., seeing translation from a dominating language into a dominated language and *vice versa* as a flow of symbolic capital), as claimed by academics, appears to reflect the significance of enlisting economics (at least one aspect of it) as a social factor, along with power and power relations, as yet two more social factors, thereby giving the complete picture of a sociology of translation the final touch (Ibid. 99-100). This, I believe, should be the true account of the logic for assigning working languages and procedural languages.

The law, or, more specifically, legal terminology, is so culture-bound and also closely linked to the local moral-legal sentiment of the jurisdiction that legal translation, being difficult as it is, often results in criticism and dissatisfaction. At the same time, evidently, law drafting and enacting is becoming increasingly important for the EU because of multilingual legislation as required by law and policy, and the sword can cut both ways. Under the auspice of multilingualism and multiculturalism, the existing local customs and legal institutions are just as fundamental as the diverse range of languages that are used to describe them, and all of them need to be preserved and safeguarded. All this ultimately feeds into the rule of law.

Rules governing the languages of the institutions are also determined by the Council of the European Union, which is, along with the European Parliament, essentially one house of the bicameral legislature of the EU. Since 1958, national languages of all member states were to become official languages of the Community, all equal in rank and status.

Moreover, all language versions of the Treaties and of the Community measures are equally authentic, and if there happens to be any discrepancy between different language versions, they should be resolved without any particular language given any priority or privilege.

This means that in the event of ambiguity, the judge should determine which version best suits the spirit of the law (via legal hermeneutics), without necessarily giving weight to any particular one. Of course, as long as the parties so prefer, private contract terms could be designed to the advantage of one particular version in the event of ambiguity.

Now, finally, let us review some concepts and insights from economics that I find most relevant to legal translation, bearing in mind that controversy may occur in any context and in any form, most likely involving ethics.

### 3. Legal Translation and Language Policy in Ireland

Ireland, or *Éire* in Irish, is a special—and peculiar—case in point for me as far as my research is concerned for a number of reasons, and it deserves a special mention here. Apart from the obvious fact that this thesis is being completed in Ireland, there are so many unique and fascinating facts about the Irish language. The first thing that comes to mind would be the ancient tradition of the history of the language. For one thing, although there is no conclusively established date as to when the first Celtic-speaking tribes invaded Ireland or when Irish eventually replaced all indigenous languages, it has been safely postulated that the process commenced around 500 BCE (Ó Ceallaigh and NíDhonnabháin 179). Evidence conclusively shows that by the 19<sup>th</sup> century, the island of Ireland had attained true bilingualism, and while the English language had already taken root in daily life by this time, there was no serious decline of Irish until well after the Potato Famine of the 1840s was over. In addition, not only is Irish accredited as one of the oldest scripts in the world (Ibid. 180), but the Irish language also has one of the oldest vernacular literatures across Western Europe (Kelly and Zetzsche 23). Its literature is so ancient and significant



that the country Ireland and its language combined—along with the markings and writings in the Ogham script that existed in Ireland prior to the arrival of Christianity—have made an amazing and disproportionate impact (“disproportionate” in the sense that Ireland is a country relatively small in size) on world literature (Ibid.). By the way, Karl Marx always saw the Irish independence struggle as a platform where nationalism, race and ethnicity coincide believing that it in fact was deeply linked to the struggles of British workers against capitalists (Anderson in Musto 32-33). This is indeed a maverick view—even to this day.

To begin with, like it or not, language has been a hot-button issue in Ireland for a good many people—and for some time now. Since the establishment of the Irish Free State in 1922, national identity has remained at the epicenter of all discourse surrounding the Irish language, with the first two constitutions of Ireland (1922 and 1937) being the primary drivers in promoting language rights and the rights of those who seek access to the legal system through the medium of Irish (Ó Conaill 13). Owing to the symbolic value of the language, the Irish government decided to make an effort to revive Irish in the country as a whole and to stabilize Irish in the areas where it was still a native language at the time of independence. Understandably, those first years of constitutional politics were marked with Fianna Fáil’s efforts of ridding the nation of British influence and control as well as a special focus on the Gaelic nature of the Irish Free State (1922-1937), legally a dominion within the British Empire (Hussey 163). As a result, compulsory regulations for teaching and learning Irish in schools were adopted and enforced. While all that was understandable back then in light of the country’s unique history, the relationship between Irish and English needs to be examined and sorted out critically today—with no emotions getting in the way. Apparently, Article 8, which is placed under the heading *The State*, of the Constitution of the Republic of Ireland provides the Irish language with status as both the “national language and the first official language” (Article 8 Section 1) and the English language with *recognized* status as a “second official language” (Article 8 Section 2).<sup>90</sup> And whenever there is a conflict between the two versions of the Constitution, the one in the

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<sup>90</sup> Please note the subtle but tactical difference in the wordings of paragraphs 1 and 2 of Article 8.

national language, Irish, is to prevail (Article 25.5.4)<sup>91</sup>. That being the case, almost a good century on, what do we have? Sadly, nothing but a situation for the Irish language that is even more desperate, where many people confess that the language still needs to be promoted, differing on and fighting over how much funding and resources should go into that process.<sup>92</sup>

That being said, however, Irish is granted official status in Ireland (both the Republic and Northern Ireland) and in the European Union, but its glory apparently stops right there. Estimates of the number of fully native speakers of the Irish language fall somewhere between 40,000 and 80,000, with those who actually do speak it on a daily basis being even rarer (Kelly and Zetzsche 21). This roughly falls in line with Irish census results. Attitudes towards the Irish language vary greatly among different social classes, and as Ireland steps up its urbanization progress, affiliation with the once decisive symbol of identity is slowly faltering. This is what makes the current language situation in Ireland so unique and interesting; around the globe, most countries where language rights are most pronounced are ones where minority languages do not receive the protection they deserve in the face of a powerful and mainstream “official” language, as is the case of Canada where the Francophone minority chronically faces discrimination in a predominantly Anglophone country. For sure, there are many countries where the number of speakers of a minority language is routinely underrepresented in figures and statistics and underestimated by government officials, but in the Republic of Ireland the opposite seems to be true; in the republic, today—almost a century on since its independence in 1922, youngsters who do not speak English face zero job prospects—plain and simple—at home and abroad, and it is the national language and first official language—Irish—that is dwindling—not English. No wonder some have already declared the battle to salvage the Irish language “lost”.<sup>93</sup> All things considered, language is a social factor no different from gender, and in much the same way that gender and sex permeate every aspect of people’s lives, so does language—

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<sup>91</sup> This article of the Constitution provides that “In case of conflict between the texts of any copy of this Constitution enrolled under this section, the text in the national language shall prevail.”

<sup>92</sup> <https://www.independent.co.uk/news/world/europe/irish-becomes-the-23rd-official-language-of-eu-430615.html> Accessed on 08 September 2018 at 11:01 am (UTC).

<sup>93</sup> Mick Fealty, <https://sluggerotoole.com/2006/02/02/lets-face-it-the-battle-to-save-the-language-is-lost/>. Accessed on 07 September 2018 at 12:25pm (UTC).

though maybe in a more subtle way.<sup>94</sup> As sociolinguists have noted repeatedly, the dual nature of language as both a social and a personal construct has led individuals to form speech communities<sup>95</sup>—either purposefully or nonchalantly (Wardhaugh 116). At the same time, of course, a “typical person” from each speech community must be assumed and then adhered to. This is by and large how people from a country, say, France, identify a fellow countryman, and it is also how a person in a trade or a line of business (say, masonry) identify their “colleagues”. For the sake of context, let us take a look some basic statistics. In the early years of independence, the state strongly supported primary education and post-primary education in Irish, and by 1948, there were 102 schools with close to 11000 pupils (Tovey and Share 338). To this day, all Irish schoolchildren must learn Irish (as part of the core curriculum) in all primary and secondary schools. According to the Census of 2016, which was taken on 24 April 2016, 39.8% of all Irish people aged 3 and over (or 1,761,420 persons) speak Irish. However, of the roughly 1.77 million self-proclaimed Irish speakers, only 4.3% (73,803 persons) indicated that they spoke Irish on a daily basis and outside of the education system.<sup>96</sup> On top of that, of all 26 counties under the administration of the Republic, County Galway had the highest percentage of Irish speakers with 49% of the local population indicating they could speak Irish. Admittedly, 49% is by no means a high figure for a language that is supposed to be official and national. The very fact that the Official Languages Act 2003 (or, in Irish, *Acht na dTeangacha Oifigiúla* 2003) needs to stress in its prologue that the act is meant to “promote the use of the Irish language for official purposes...” is a tell-tale sign that there are so many people who do not speak it well, if at all. At the same time, there have been doubts about people’s responses to the census questions about their Irish language proficiency because most people were required to take Irish language courses at school and, therefore, they felt the “pressure” to claim their “Irishness” by claiming that they spoke both Irish and English even outside the regular education system (Hussey 496). In addition, there are also loud voices claiming that the

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<sup>94</sup> Sociology, just like all of the disciplines in the social sciences, is divided into fields or areas of specialization, which loosely overlaps with social factors such as gender, age and language. For simplicity’s sake, the sociological perspective is the claim and position that human beings cannot exist outside of the context of human society, and, at the same time, understanding the overall structure of our society would be a good point of departures for self-understanding.

<sup>95</sup> In Ireland, these are generally referred to as *Gaeltachtaí* (singular: *Gaeltacht*) in Irish. Please note that there is no direct reference to this term anywhere in the Constitution of the Republic of Ireland.

<sup>96</sup> *Vide* Census 2016 Profile 10 – Education, Skills and the Irish Language.

main reason why Irish is still spoken in small enclaves known as *Gaeltachtaí*<sup>97</sup> that are mostly concentrated in patches along the western seaboard of the country is because those places rely heavily on the government for economic assistance, and it was part of the government's plan to keep it that way to begin with (Hussey 496). In other words, *Gaeltachtaí*, as a part of a larger language policy, are very political in nature. As a matter of fact, outside of the *Gaeltachtaí*, and especially in urbanized areas like Dublin and Cork, due to the large-scale influx of immigrants in recent years, one would probably have a better chance of hearing languages like Lithuanian and Polish being spoken in broad daylight than Irish being spoken by a native speaker.<sup>98</sup>

Things do not look that much brighter in Northern Ireland either, where the status of Irish is routinely a political flashpoint for all parties concerned.<sup>99</sup> True, things have taken a sharp turn after the Belfast Agreement of 1998, which was supposed to urge all parties to “recognize the importance of respect, understanding and tolerance in relation to linguistic diversity”, considering Northern Ireland's unique political climate, yet there is still much to be desired in this respect. While the Irish language enjoys nothing but status as a recognized minority language in Northern Ireland primarily under the auspices of the European Charter for Regional or Minority Languages (ECRML) sponsored by the Council of Europe, it has nonetheless been a strong symbol of identity for some, and all discourse in connection to it has always been highly politicized. As sociolinguists note, the rise and decline of any language is rarely a natural and non-human event; instead, the relationship between a majority language and a minority one is a relationship of power through and through (Tovey and Share 333). As a quick example, it often comes up during the run-up to elections, when political rivals attack each other by discrediting their election platforms. As a case in point, at the onset of her party's Northern Ireland Assembly election

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<sup>97</sup> Currently, there are seven official *Gaeltachtaí*, and they are located in the counties of Donegal, Mayo, Galway, Kerry, Cork, Waterford and Meath. Again, there is, however, no mention of them whatsoever in the Constitution of the Republic of Ireland.

<sup>98</sup> As an antithesis, according to sociolinguist Edwards, Irish language revival efforts may backfire in the sense that the pure and virgin homeland, if left untouched, will get encroached upon by undue external influence while any revival effort will make the enclave artificial to an almost mythological level, thereby attracting migration from outside of these *Gaeltachtaí*. This will eventually dilute the language base—something no language and culture preserver would want. This is what he calls the “paradox of the *Gaeltacht*”. For details, see John Edwards, 1994, pp. 109 *et seq.*

<sup>99</sup> <http://www.thejournal.ie/irish-language-act-explainer-3851417-Feb2018/>. Accessed on 27 August 2018 at 2:49 am (UTC+8).

campaign of 2017, Democratic Union Party (DUP) leader Arlene Foster took aim at Sinn Féin's consistent calls for an "Irish Language Act" to be passed by arguing that there are actually more people in Northern Ireland that speak Polish than speak Irish.<sup>100</sup> Studies reveal that in Northern Ireland today, loyalists and many nationalists alike have been familiarizing themselves with the Irish language over the past two or three decades (Nic Craith 75). Since the heydays of The Troubles of the 1960s, extreme nationalism has been believed to be somehow connected with the language revival movement (which, of course, is not entirely true) (Hussey 496), and what Foster said in the election campaign only serves to fortify this assumption.

According to some sociolinguists, language issues have remained equally controversial in the post-Agreement period<sup>101</sup> for Northern Ireland, with the Northern Ireland Assembly being given a very limited say on the question of language as compared with the Scottish Parliament (Mac Sithigh: 83). Now, this begs these questions: Under what circumstances should a language be given official status? And for what languages should legal translation be made mandatory? Even in Britain, where English is the *de facto* official language<sup>102</sup>, there have been talks about recognition for other languages and the degree to which such recognition should be given—especially under the non-codified constitutional tradition of the United Kingdom (Mac Sithigh 77). Presumably, a language deserves official status when it is vulnerable or endangered, especially if it is located alongside a privileged language like English, and legal translation would be an ideal way of achieving that.

Truth be told, while the language family of Indo-European languages is by far the most extensive and expansive language family in the world, the Irish language, along with virtually every other language within the subgroup of Celtic languages such as Welsh and Breton, is slowly dwindling, as statistics have been showing (Katzner 14). The Celts once being a powerful people dominating a large portion of Western Europe, their language is now seriously endangered (Ibid.). One descendant of their protolanguage, Cornish, became extinct in the 18<sup>th</sup> century, while another descendant, Manx, died out recently too when the

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<sup>100</sup> <http://www.thejournal.ie/arlene-foster-polish-speakers-irish-speakers-northern-ireland-facts-3228915-Feb2017/>. Accessed on 28 August 2018 at 5:38 am (UTC+8).

<sup>101</sup> By the term *agreement*, I am referring to the Good Friday Agreement of 1998 signed in Belfast and subsequently ratified by referendum by both sides.

<sup>102</sup> The United Kingdom is one of only eight countries in the world without a *de jure* official language.

last native speaker reportedly passed away. Irish, as the dominant Celtic language that remains alive today, is, sadly, nonetheless losing ground to the powerful English language inch by inch for obvious reasons. Nevertheless, euphemistically, Gemma Hussey calls the current status of the language “weakening” (Hussey 498). On the other hand, some people think otherwise; they believe that Irish, as with all other human languages, is simply *evolving*, with schoolchildren not only learning it within the education system, but also in the everyday context (Kelly and Zetzsche 24). Presumably, official status must be granted to a language that is in a disadvantaged position like many of these Celtic languages, especially one with such a rich and ancient literary tradition as Irish. Our question then is this: How are we to accomplish that?

For the lucky few with a good memory, in 1934, then-Chief Justice Hugh Kennedy said somewhere in his opinion for his decision in the case *Ó Foghludha v. McClean*<sup>103</sup> that:

"None of the organs of the State, legislative, executive or judicial may derogate from the preeminent status of the Irish language as the national language of the State without offending against the Constitutional position..."

In 1983, Justice Ó hAnnuin stated in the case *An Stát (Mac Fhearraigh) v. Mac Gamhna*<sup>104</sup> that:

"It will be noted that Irish is accorded a higher level of recognition in the Constitution of Ireland than it had in the first Constitution, since it is referred to for the first time as 'the first official language'. At the same time, greater scope is given to the Oireachtas to give priority to one language over the other in accordance with the law insofar as relates to official matters in any part of the country. [...] Until the Oireachtas exercises the function conferred on it by the provisions of the Constitution, it must always be assumed that Irish is the first official language, and that the citizen is entitled to require that it be used when the State has official matters to administer."

Finally, in 2001, while conferring the majority opinion in *Ó Beoláin v. Fahy*, Justice Hardiman, stated that:

“In my view this has led to a situation where only a person of unusual independence will attempt to conduct his or her legal business through the medium of Irish...[...] I can only say that this situation is an offence to the letter and spirit of the Constitution.” [...] “It is my opinion that it is not possible to exclude Irish, which is the national language and at the same time the first official language of the State, from any part of the public discourse of the nation or from any official business of the State or from the official business of any of its members. Nor is it possible in these contexts to treat it in a manner

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<sup>103</sup> *Ó Foghludha v. McClean* (1934) I.R. 469.

<sup>104</sup> *An Stát (Mac Fhearraigh) v. Mac Gamhna* (1983) T.É.T.S. 29

which is less favourable than the way in which the second official language is treated. Neither is it possible to prevent those who are capable and desirous of using Irish in making their case or in communicating from so doing or to disadvantage them when so doing in any national or official context."

In hindsight, all these opinions may appear surprisingly superfluous today at a time when language rights are taken for granted, especially to a translation professional in an officially bilingual country like Ireland, but they did sound revolutionary and explosive when they were being rendered for the first time.

This apparent trend in favor of legal translation rights for Irish speakers seemed to suffer a major setback on 2009, when the High Court Justice Charleton ruled in [2009] IEHC 188 that:

"The State is not required to produce any particular class of documents that concern a criminal process in either Irish or English. The State can choose one language or the other. [,,] An illiterate person can get a document read, an English-speaking person can get someone to explain an Irish document to him...[...]"

Fortunately, in 2010, the Supreme Court's Justice Macken, in [2010] IESC 26, held that:

"[...] an individual may be entitled to claim that the absence of a particular statutory instrument or of even more than one, in Irish, may constitute, in a particular case, an inhibition or an impediment on such an individual seeking to vindicate his right to use the first official language in court proceedings [...] I would make a declaration that there is a constitutional obligation to provide to the respondent, in his capacity as a solicitor, all Rules of Court, including all amendments, forms and indices thereto, in an Irish language version of the same, so soon as may be practicable after they are published in English."

The trend now looks promising.

In light of the current status of the Irish language, one cannot help imagining the status of legal translation (or any form of translation) in Ireland, as well as the legal grounds for legal translation, and the legal grounds for requiring that all state legislations be made available in both languages. Reverting to Article 8 of the Constitution, Section 3 adds that provisions may be made by law for the exclusive use of either one of the two languages under certain circumstances.<sup>105</sup> This rule, again, seems to confer a more favorable status on Irish over English, but it can also work as a double-edged sword in that it grants the right to the relevant state body to use *either* language (could be either Irish or English) at its discretion. In addition, in the event of any ambiguity arising from the two versions of the

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<sup>105</sup> *Vide* Article 8.3 of the Constitution of the Republic of Ireland.

Constitution, the one in the Irish language prevails. Also, Article 25.4.6 provides that “in case of conflict between the texts of a law enrolled under this section in both official languages, the text in the national language shall prevail”, thereby giving priority to the Irish version of any law passed by the legislature. Presumably, then, the two languages do not enjoy equal official status in the real sense. In the preamble of the Constitution, one can easily see the lofty ideals of dignity, justice and freedom here and there, with the notion of equal rights looming vaguely in the background. Then, Article 25.4.4 states that “Where the President signs the text of a Bill in one only of the official languages, an official translation shall be issued in the other official language”, seemingly compelling translation of all laws and acts that get passed by the Oireachtas. The court in the *Ó Beoláin* case acknowledged that the State had such a duty to produce the required translations for simple reference by the general public as laid down in the Constitution<sup>106</sup>.

With regard to language rights in relation to translation policy, the *Ó Beoláin v. Fahy* case of 2001 is certainly remarkable. The presiding judge in this case, Justice Adrian Hardimann, made it quite clear that under Article 8 of the Constitution, Irish-speaking citizens are fully entitled to conduct their business with all public bodies of the state in Irish if they so prefer without being disadvantaged in any way. The right to be heard and to use the Irish language in courts is also specifically provided for in Section 8 of the *Official Languages Act 2003* (OLA), under which An Coimisinéir Teanga (The Language Commissioner) was created for the promotion of the language rights of all Irish and English speakers in Ireland. This parliamentary provision makes the status of the state’s obligation to translate somewhat ambiguous, and it is worthy of some investigation. The landmark case of *Ó Beoláin* of 2001 marked the start of some gradual but substantial development of Irish language rights (*Ó Conaill*: 6). Historically, a major focus of legislative activity has been in relation to *Gaeltacht* areas, which was not truly specific to language, and, surprisingly, comprehensive legislation on the Irish language was close to nil until 2003 (Mac Sithigh 88). The implications of the *Ó Beoláin* case must be examined in the context of the many other cases that came about in the immediate aftermath of the case. On the legislative side of it, amongst the most direct and significant ramifications of the *Ó Beoláin* case was the passing

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<sup>106</sup> [2001] I.R. 305 SC



of the *Official Languages Act* of 2003 by the Oireachtas, which served to impose new obligations on the State and all state agencies as well as providing additional support for those seeking to access the judiciary or any other state body in the Irish language, the first official language of the land. Before that, hardly any hard and comprehensive legislation on Irish had ever been adopted, with scholars and judges often struggling to identify legal grounds for the use of Irish by the citizenry, despite the establishment of some government bodies such as the *Bord na Gaeilge* (now incorporated into the cross-border body *Foras na Gaeilge* (or “Irish Institute”) along with *An Gúm* (Publishers), and *An Coiste Téarmaíochta* (Terminology Committee)) (Mac Sithigh 88). In any case, the *Official Languages Act 2003* sets forth a number of government duties such as the publication of documents and the use of stationery, provides for a series of language schemes. Moreover, more recently, under the Gaeltacht Act 2012 a major review of Gaeltacht policy was initiated. In 2017, the first statutory instruments under this act defining the first wave of language planning areas in advance of the agreement on new language planning for those areas were adopted (Ibid.). Also, a government agency entitled the Department of Culture, Heritage and the Gaeltacht was eventually established in 2011 within the executive branch.<sup>107</sup>

At some point in the course of the case of *Ó Beoláin*, the court discovered from the evidence presented by the parties that the practice of automatically providing an official Irish translation of all acts of the Oireachtas ended altogether around 1980, with the 1980 volume of the Statutes being the last one to be published bilingually in both Irish and English—in clear violation of the State’s constitutional duty. Furthermore, to the dismay of avid supporters of Irish nationalism and much to the court’s surprise, the court also realized that due to chronic staff shortages and persistently heavy workloads, hardly any statutory instrument had been translated into Irish ever since unless it was for use in a high-profile case, in which case it would require a specific certificate signed by an officer of at least a certain rank. The applicant in this case had to be given the Irish version of all statutes and regulations concerned in a timely manner, as his right of access to the courts and his right to a fair trial, two fundamental constitutional rights, were highly dependent on his language

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<sup>107</sup> This government agency was first founded in 1977 as the Department of Economic Planning and Development, before being renamed as the Department of Energy in 1980, with several subsequent changes in name and/or function along the way, before it ultimately took up its current title in 2011.

rights, something also guaranteed by the Constitution. In my opinion, if seen in this light, virtually all bills and laws passed by the Oireachtas made available in only English and coupled with a lack of Irish translation for decades amount to yet another violation of equal status for both languages. And this one is in addition to the unequal status embodied in Article 25.4.6, presented a few pages ago, whereby Irish presumably enjoys a higher status than English in the event of a conflict. Either way, the status of the two languages looks more peculiar here at home than anywhere else in the world. Even after the enactment of the Official Languages Act, issues have continued to arise, with a notable 2014 case being *Ó Maicín v Ireland*<sup>108</sup>, in which the Supreme Court dismissed a request by a defendant to have his case heard by a jury that would be bilingual in Irish and English, citing that for jury members to have to hear a legal case through an interpreter when Irish is being spoken would not *in se* infringe on his constitutional right to use Irish in his regular line of business.

The gist of the *Ó Beoláin v. Fahy* case, I believe, should be multifold. At a minimum, all language policy is political in nature, and the one featured in this case is no exception. The ECRML, as the *lex specialis* on the matter, is a treaty concluded in the framework of the Council of Europe in 1992 under the auspices of Article 27 of the International Covenant on Civil and Political Rights of the United Nations, and under the ECRML, states are required to report on their progress of implementation of the ECRML to a special committee. Unfortunately, Ireland has never signed or ratified this treaty while, interestingly enough, the United Kingdom has done both, and, by virtue of the UK's membership in the treaty, Irish is recognized as a regional and minority language (though with some reservations).

Also, as language law expert *Ó Conaill* points out, in light of the judgment in *Ó Beoláin*, Article 25.4.4 of the Constitution and Section 7 (which is located in Part 2: Organs of State) of the Official Languages Act 2003<sup>109</sup>, the only reasonable conclusion that any court could possibly reasonably draw was a right to translation (*Ó Conaill* 120). In addition, in the wake of the court's decision in *Ó Gríobáin v. An Comhairle Mhúinteoireachta & cuid eile*<sup>110</sup>,

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<sup>108</sup> [2014] IESC 12

<sup>109</sup> The full text of this particular section: As soon as may be after the enactment of any Act of the Oireachtas, the text thereof shall be printed and published in each of the official languages simultaneously.

<sup>110</sup> [2007] IEHC 454

Ó Conaill noticed a subtle shift—at least on the part of the judiciary—one from the view of language rights (which was evident in *Ó Beoláin*) towards framing the obligations in relation to the Irish language as a form of a declaration (Ibid. 122). He finds this shift troubling, which I agree, in that it did not go far enough with state protection of language rights for citizens with Irish language rights merely being *implied* and *declared* by Article 8 of the Constitution, which cannot be invoked by average citizens as legal ground for their right to being served in the Irish language if they so prefer.

On the face of it, in relation to language rights and the right to translation, the findings of the court in these cases seem natural and totally expected; after all, where on Earth would a citizen not be allowed to utilize public services in the medium of the official language of the venue? Who dare claim outright that all the constitutional provision had was symbolic value? Wouldn't it be rather ironic to say something like “an act to promote the use of the Irish language for official purposes in the state; to provide for the use of both official languages of the state in parliamentary proceedings, in acts of the Oireachtas, in the administration of justice, in communicating with or providing services to the public and in carrying out the work of public bodies...” in the prologue of the Official Languages Act? Sometime during my write-up of this thesis, I noticed how odd it was for a country like Ireland, whose people have a strong sense of identity that is manifested in large part through language, to have but one article (section) in their constitution in regard to language and language rights. By contrast, in the Canadian Charter of Rights and Freedoms, Canada's *de facto* constitution, there are two headings to this effect that come with several sections, each of which, in turn, comes with numerous further subsections. As a matter of fact, it is through the legal system in modern constitutional democracies that rights (this includes language rights) are recognized, and the manner in which a state interacts with a language—any language, and not just official languages—is firmly rooted within the legal system of that state (Ó Conaill 11). In Canada, at least at the federal level, all laws are required to be made available in both official languages, and this is usually done simultaneously without any delay between the two versions. And not only federal laws, but everything of a public nature at the federal level is available in both official languages, and this even includes aviation services (Air Canada) and postal services (Canada Post), even

though Air Canada has long been privatized and publicly traded on the stock exchange, while Canada Post has been converted into a Crown Corporation for more than three decades now. By the same token, one would easily assume the same thing of Ireland, which is also an officially bilingual country—and in the end, one would definitely be astonished to find out that this is not the case.

Let us revert back to the idea of bi-/multilingualism for a moment. Whenever there is multilingualism in a country/jurisdiction, it implies that there are several groups marked and separated by language, and when there are different groups, there will definitely be barriers. The two levels of multilingualism, the individual level and the social one, might not correspond with each other as well as most people imagine (Edwards 55). Then what do we do to cross, if not tear down, those language barriers? According to John Edwards, the sociolinguist, there could be two ways of doing that: one, the use of a *lingua franca* and two, translation (Ibid. 39).

Then what implications does this have for Ireland and the Irish language? Needless to say, English is and will remain the *lingua franca* of Ireland, at least in name, although I am not sure if calling a language spoken fluently by more than 90% of the population on a daily basis a “lingua franca” would be appropriate. This will probably be even more so now that the United Kingdom is set to leave the EU very soon. At the same time, though, presumably, translation is in a good position to break down barriers between the Irish-speaking community and the mostly English-speaking community in the country, especially when it comes to dealings with the justice system, in which case legal translation has a large role to play. In this sense, then, legal translation, and courtroom interpretation in particular, should be guaranteed by law, as it actually is in many countries—including Ireland. Any citizen should have the right to conduct his or her case in the Irish language. The right of access to the courts and the right to a fair trial being strongly established constitutional rights, the availability of all important documents available in the language of a person accused of a criminal offence is an essential element in his access to the courts and in his right to a fair trial. This sounds simple enough, as we are not even talking about the effective protection and promotion of minority and regional languages as provided in the ECRML.

The Constitution of 1937 was adopted and accepted through a referendum, and it has seen a good many amendments throughout the years. However, while a constitution for the new-born nation meant final separation from the British Crown, which was not formally consummated until 1948, it has never introduced a new system of laws for Ireland, and it probably never will. Having been in use in Ireland for centuries, common law was something no one dared forsake, especially when a well established court system had been in place since 1614, which was the year in which five circuits started to embrace the whole island after courts of assize had been roaming it for decades (Doolan 3). Membership in the EEC, which was backed by a referendum, then membership in the EC and then finally membership in the EU has helped to shape the modern country. Today, by virtue of Article 29.4.6 of the Constitution, all laws necessitated by Ireland's membership in the EU will automatically have legal binding force in Ireland. Then according to provisions set forth in the Treaty of Lisbon Article 41.4, every member state bears a linguistic obligation to its citizens. Some language rights scholars argue that if the treaty can go one step further by singling out minority languages that enjoy some degree of official recognition in their own countries, then all existing political claims to self-determination or secession by speakers of minority languages may vanish, not to mention that new language legislation might help resolve linguistic conflicts between speakers of majority and minority languages throughout the EU (Faingold 34).

In Ireland, the approval of language schemes under the Official Languages Act is a function vested in a minister, while in both Scotland and Wales, it is a responsibility of a board or agency (Mac Sithigh 16). Indeed, in light of the wording in this 2003 Irish law, it is clear that the framers of the law deliberately wanted to prevent individuals from claiming any language rights vis-à-vis the state directly, especially through litigation (Ibid.), and courts have been complicit in this position by making a distinction between constitutional aspiration and enforceable rights in connection to individual right to language and/or translation. Some have observed that for some unexplained reason, language issues (as well as, by inference, translation issues) have never been able to take advantage of minority or equality rights legislation in Ireland (Ni Dhrisceoil 50). True, the Irish constitution was influenced by the constitutional texts of other European countries in areas such as human rights, but language rights questions were, on the whole, nonetheless treated as a question

of status and not a minority right (Mac Sithigh 16). The most interesting and unique thing about the Irish language situation is that it is actually the national and first official language that is in need of legal protection—and not the second official language, English. While there are some who claim to speak fluent Irish on a daily basis, the truth is most people do speak English—as native speakers—and most legal documents and legal instruments were originally prepared in English with the corresponding Irish version totally absent. In light of these peculiarities, Verona Ni Drisceoil examines—and subtly laments—the legal position of the Republic of Ireland in regard to the Irish language, strongly concluding that the legal approach to the Irish language should be “underpinned by a vision and conception of substantive equality” in reference to many legal cases from Canada (Ni Dhrisceoil 50-51). In other words, perhaps a right that is more purposeful and direct in connection to language and translation—and backed by judicial and administrative remedies in the case of breach—would be a good idea for Ireland.

## Chapter Two: Behind Turns in Translation Studies: Interdisciplinarity

Umberto Eco: *Translation is the language of Europe*.<sup>111</sup>

### A. The Development of Translation Studies as a Discipline

Common sense suggests that everything is rooted in time and space, and the advent and development of the discipline that we call “translation studies” today did not, in all likelihood, happen by chance. Perhaps because translation had often been considered an idiosyncratic and marginal and peripheral aspect to foreign language learning, it was, sadly, rarely studied for its own sake until fairly recently. Globalization has increased demand in mediation and transfer amongst cultures, languages and religions, and, as a result, translation has become a venue for global relations of exchange. Arguably, this is because translation is always done for a specific purpose, and, as such, people tend to focus their attention on the purpose that translation is meant to serve and not on the activity itself. Despite the fact that James Holmes presented a conference paper entitled *The Name and Nature of Translation Studies* in 1972<sup>112</sup>, in fact, it was not until 1978 that André Lefevere, one of the pioneers of this discipline, proposed that the title “translation studies” be used for the discipline that concerns itself with the problems arising in the course of the production and description of translation activities (Bassnett 2002: 11). As a burgeoning new field back then, it had witnessed a lengthy struggle originating in the age-old dichotomy of word and sense, which, in turn, served as the two predominant criteria for the other dichotomy of faithful translation versus free translation<sup>113</sup>. Then, as more and more people started to recall how Schleiermacher, the renowned German translation theorist of the Romanticism era who insisted that the translator either leave the reader in peace and try to move the

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<sup>111</sup> Remark rendered by Umberto Eco at the conference of *Assises de la Traduction littéraire en Arles*, on Sunday, 14 November 1993.

<sup>112</sup> The full text of this paper is included in *The Translation Studies Reader* (2000), edited by Lawrence Venuti, pp. 172 *et seq.*

<sup>113</sup> While there is some controversy as to who the original creator of this translation maxim was, I will, for the sake of brevity and because of its insignificant relevance, I will leave it out. For details, however, please refer to Snell-Hornby, 2006, pp. 9-10.

author towards him or the other way around, all of a sudden people realized that just as there was a field of scholarship called archaeology, there must be one called “translation studies” (*Translationswissenschaft*) (Snell-Hornby 2006: 6). This might not sound like sufficient justification on the face of it, but German language philosopher Wilhelm von Humboldt (1767-1835), on the assumption that language should be a dynamic thing, discovered a mysterious link between language and culture and also one between language and behaviour, indirectly suggesting the non-obvious nature of translation. On top of that, Humboldt proposed the two values of clarity and fidelity in an effort to demarcate translation from commentary (Snell-Hornby 13-14).

Truth be told, there is probably a little more to the history of translation studies as an intellectual enterprise than meets the eye. The work by the most influential German translation theorist of the 20<sup>th</sup> century Walter Benjamin *The Task of the Translator* (*Die Aufgabe des Übersetzers*), which was published in 1923, provided translation theorists with the long-awaited spiritual boost to the quest for status as an independent discipline for their subject. To this day, this work of his is still a landmark paper for scholarly discussions of the nature of translation. Benjamin, who lived most of his life in post-WWI Germany only to end up taking his own life because of the social and political crises of his days, was actually concerned with nothing but the kind of translation that would preserve the most pure and pristine form of language that could only be found in a limited and select body of writing in any natural language, and the translator is duty-bound to release that potentiality (Baker 2008: 194). Forming the main line of his argument is his view of translation as part of the afterlife (*Überleben*), which, by virtue of the transformation it entails, guarantees the survival of the foreign text. The translation (or target text) effectively becomes not just the afterlife of a text, but also a new “original” in another language (Bassnett 2002: 9). Indeed, this metaphysically positive view of translation resonates with the claim that translation is a form of communication that transcends culture, time and space (Ibid.).

Of course, the history of this new discipline has not always been bright. To this day, there are still people here and there, some of them translators themselves, who doubt that there is any theory to translation at all, and that even if there were, what translators need is more practice and not more abstract theory (Wilson 2009: 178). In fact, Snell-Hornby



acknowledged this in her book entitled *Translation Studies: An Integrated Approach*, which was published as recently as 1988:

The status of the new discipline is however still uncertain, and in the traditional language departments, it is at best known from hearsay. Even the historically oriented theories of literary translation remain exotic material, rarely taught and virtually unknown [...] with this background, it is hardly surprising that translation has such low status and translation theory is viewed with such scepticism in academic circles. (Snell-Hornby 1988: 8)

Nonetheless, she did sound confident somewhere towards the end of her book that translation studies would no doubt become a discipline of the future, especially in a world that was rapidly shrinking and where international communication across cultural and traditional boundaries was becoming more or less a routine. After all, overcoming language barriers would be unthinkable without the service of translators (Snell-Hornby 1988: 131). As a matter of fact, up until around 1990, it was not unusual for a scholar in disciplines like linguistics, communication and comparative literature to argue that translation was in no need of a distinct theory, as everything being said about translation could have easily been subsumed under the greater headings of hermeneutics, communication theory and the like.<sup>114</sup>

The truth is, today, there are probably as many perspectives on translation as there are translators, and regardless of one's stance, the ultimate and yet central question will always be this: Given the source text, how do we go about producing the right (target) text for the intended target audience? What is the mysterious—maybe even mystic—algorithm or formula forming the link between the two texts? Precisely because of these unsolved mysteries, translation theorists have for decades been engaging in an all-out pursuit of the true nature of translation, formulating several shifts and turns along the way and forging “coalitions” and “alliances” with other academic disciplines—typically in the name of interdisciplinarity or multidisciplinary. Now that we are wrestling with these questions,

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<sup>114</sup> Ernst-August Gutt, for one, claimed very confidently in his PhD thesis, which was published in 1989, that “the translation phenomenon may easily be accounted for naturally within the relevance theory of communication developed by Sperber and Wilson, and there is no need for a distinct general theory of translation at all. Most genres of translation can be analysed as varieties of interpretive use.” *Vide* Gutt, *Translation and Relevance*, PhD Thesis, University of London, 1989.

translation can no longer be regarded as nothing but an everyday speech event. By now, the interdisciplinary character of translation should be obvious.

Things started to take a sharp turn in the 1980s, when the cultural turn (which will be covered later in this chapter) appeared. The cultural turn was, presumably, the first turn to appear in translation studies circles. Since the beginning of the cultural turn, equivalence—at least plain and raw equivalence—stopped being the one and only metric for translators, and people started to realize that a good translator must take into account *what* and *whom* the translation is meant for. Turns are not uncommon in academia, and translation studies, due to its low-key position, is not supposed to be hostile to turns, the cultural turn and the sociological turn being two of the most prominent turns to arrive on the scene in the past few decades that have greatly helped reshape and redefine translation. This may well serve as strong evidence that interdisciplinarity represents the future of translation, since, after all, synthesis, holism and (inter)connectedness—three defensible positions that help translation studies stand out—are all underlying ideas of interdisciplinarity (Klein 3). The formation of the Prague School, by which Jiří Levý (1926-1967) was heavily influenced, was, in a sense, a turning point for the development of translation studies. The Prague School was basically a group of likeminded scholars who were interested in poetic language as an autonomous mode of speech whose aesthetic function was embodied in the linguistic sign itself (Baker 379). Levý was arguably the first scholar to consider translation as a lengthy decision-making and choice-making process, making a respectable but incomplete attempt to engage economics. His 1967 paper *Translation as a Decision Making Process*, which will be cited extensively in my research, has received wide recognition in translation studies circles, and it is even collected in the edited collection of papers by Venuti *The Translation Studies Reader*, which is cited a few times in this research. Jiří Levý has proven to be one of the pioneers of translation studies even in our ultramodern times.

There is little doubt that translation studies, as a subject of research, flourished partly because of a modern-day institutionalization trend that was slowly budding at universities. This has been particularly obvious since the 1960s, and along with this came more flexibility and cooperation between and among disciplines. For example, some young

universities, such as Sussex, which was founded in 1961, and East Anglia, which was founded in 1963, were based on interdisciplinary schools of study instead of departments, and they required that students enrolled in their programs study subjects outside their major discipline (Moran 53-54). In an era of globalization, information and technology, no one discipline should be given a monopoly on anything, and extensive interaction with as many areas as possible seems to be something vital if not imperative now. Furthermore, even in the world of economics, a discipline that is decorated with a Nobel Prize and one that I will be enlisting rigorously in Chapter Three where my take on economics will unfold, there are scholars who take it upon themselves to diversify and rejuvenate their own field by establishing turns. For instance, Robin Malloy, in constructing his so-called “law and market economy framework”, in an effort to understand the interrelationship among law, culture and markets, makes use of an *interpretive and representational turn*, which is an approach that goes against the long-held view that economics has little to do with culture (italics original) (Malloy 2004: 56)<sup>115</sup>. Apparently, turns provide a convenient way out for creative and non-conventional scholars who foresee an imminent bottleneck in their enterprise or who just do not otherwise want to be confined.

In the same way as antitrust law reflects our economic thinking, and our approach to race-related problems reflects sociological thought, a sudden and unprecedented shift in people’s position can lead to a change in everything from legislation to governmental policy, and from corporate marketing strategy to academic perspectives. This broadening of perspectives on translation reached its height in the 1980s, when the contextualization of translation prompted a reconsideration of the translator as a social and ethical (but not yet economic!) agent, which eventually led to a few self-reflexive turns in translation studies (Hermans in Munday 94). After some ups and downs, thankfully, translation studies finally won its status as a discipline in its own right, and no longer just a minor branch of comparative literature or a specific area of linguistics. In retrospect, for this, translation studies owes a great deal to the cultural turn (which is the outcome of tremendous influence of cultural studies on translation). This is even considered a major “success story” of the

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<sup>115</sup> Malloy also, in the same book, made a brief mention of two other “turns” in the form of a footnote: Charles Hausman’s “linguistic turn” and Patterson’s “interpretive turn” in contemporary jurisprudence. *Vide* Malloy, 2004, p. 56.

1980s by Bassnett and Lefevere (Snell-Hornby 47). Another very important consequence of this shift in research paradigm is the unexampled focus on agents of translation, especially the translator himself, rather than the traditional focus on texts. (Munday 12) That said, much as I personally believe that the several interdisciplinary turns and shifts taking place over the years that contributed to the development of translation studies deserve some credit for this, there is still a great deal to be done for continued progress, and the deepening of interdisciplinary research on translation should definitely be on the agenda. Of course, even Mona Baker confesses that translation studies, as a young field, is not yet done contemplating “which disciplines it can fruitfully and naturally be related to” (Baker 1992: 4). This could be anyone’s guess, but at the same time, it opens up a multitude of opportunities for pioneers who want to try roaming every discipline.

As translation theorist Maria Tymoczko argues, there is still a need for more flexible and deeper understanding of the nature of translation, and, according to her, the thinking of non-Western cultures about this human activity is essential in achieving broader and more durable translation theories (Tymoczko in Hermans 2). While that might well be true, what she might have left out was the view that an innovative perspective might help to, in her words, “expand contemporary theories of translation”. Therefore, before I end, I would like to reflect upon some views on interdisciplinarity of scholars from different fields whose research could serve as an inspiration. Matthew Jackson, economics professor who is interested in applying economics to social networking, thinks that while the lack of attention that one discipline pays to another is understandable, literatures tend to be introspective and the gap between disciplines is quite huge, making it much easier to dismiss and ignore another discipline altogether than to incorporate it into one’s own research (Jackson in Rauch 36-37). Yet empirical experience has revealed time and again that academics end up facing up to the need to recognize, appreciate and then import many ideas, views and methods—even as just a mode of thought—from each other’s disciplines. And as subjects of study overlap and get intertwined more and more, their interactions and intersections will result in very healthy exchange that benefits everyone concerned (Ibid. at 37). Although Jackson was merely speaking for his own field—economics, his position does sound promising and encouraging for anyone who is devoted to more turns for translation studies, and even for anyone who believes in interdisciplinarity. This, I believe,

makes for a concise and yet complete outline of the development of translation studies and the rationale behind it.

Now let us take a look at the several major turns that have occurred and see what generalization we can draw from them.

## **B. The Cultural Turn<sup>116</sup>**

First and foremost, the cultural turn represents a revolutionary shift in viewpoint of translation as a mode of linguistic transfer to one of translation as a mode of cultural transfer. This was the era when translation studies, as scholars claim, “leaves the territory of the pioneers and enters the domain of the master” (Snell-Hornby 47)—and with good reason. Up to that point, translation had largely been studied in a prescriptive and source-text-oriented manner, focusing exclusively on linguistic features of the source text in search of textual faithfulness and equivalence, and it was not until the late 1980s that scholars started to adopt a more target-culture-oriented attitude, making the potential function and/or repercussions of the translation text in the target culture the highlight of the new paradigm, thereby viewing translation as a mode of communication (Ibid. 49).

Translation scholars seem used to approaching translation issues from a cultural perspective with their own distinctive cultural awareness. Since the term “cultural turn” was proposed by Snell-Hornby and promoted by Bassnett and Lefevere in the anthology of *Translation, History and Culture* of 1990, the enthusiasm to tackle translation problems from various cultural perspectives started to flourish among translation theorists. In her work *Translation Studies: An Integrated Approach*, Snell-Hornby enthusiastically describes a culture-based translation theory labelling translation as a cross-cultural communication event/activity, to which an entire chapter, i.e., Chapter 2, is dedicated (Snell-Hornby 1988: 41 *et seq.*). André Lefevere’s theory on patronage, poetics and ideology approaches translation by positioning the literary system into the larger social and cultural context that allegedly places

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<sup>116</sup> Actually, lest there be confusion, in the humanities, the “cultural turn” refers to something slightly different, though equally important. It was a movement beginning in the early 1970s among scholars in the humanities and social sciences attempting to make culture the focus of contemporary debates; it also describes a shift in academic attention for cultural studies, which was largely the result of numerous interdisciplinary courses and programs that involved cultural studies. For details, *Vide* Moran 56.

constraints on the translator (Lefevere 1992: ch. 5). For him, apparently, all facets of translation—from text choice to translation strategy to publication—have a great deal to do with ideology, and, hence, translation is deeply grounded in the politics of the time and place (Tymoczko in Baker 2010: 225). Subsequently, translation studies is glorified by the feminist perspective which purports to construct a feminist discourse around postcolonial translation studies that would place cultural hegemony and cultural identity within its sphere. Apparently, none of these approaches to translation studies treat translation as something mechanical, static and stable but, instead, as a culture transmission activity subject to constraints from a number of extrinsic factors, and this will definitely broaden the horizon of translation studies for the better. Because of this, it is basically accepted industry-wide that Susan Bassnett and André Lefevere were among the first to speak out for the cultural turn most vocally (Snell-Hornby 50). In their essay collection *Constructing Cultures*, Bassnett and Lefevere propose the importance of ascertaining the dynamics of culture formation through translation both on the part of the translator (i.e., Why are many translators attracted to certain types of texts?) and from the perspective of the two cultures involved (How is the source culture depicted for the target culture by means of translation?) (Bassnett and Lefevere 10). In an increasingly globalized world where access to information looks easy, the role of the translator and his translation deserves some rethinking, and we should even try asking ourselves this: Who is the translator to be given such enormous power in the shaping and forming of one culture for another?

This did not happen by chance. Translation theorist James Holmes, the “forefather” of descriptive translation studies (DTS), once claimed that the study of poetry was not just a matter of linguistics but one of literature and culture when he was reviewing the diachronic elements of poetry translation. On the other hand, Susan Bassnett went to great lengths to make a detailed explication on what weight the target culture carries for the translator. Snell-Hornby regards translation as a form of cross-culture communication in which language serves as a key component, a position shared by the *Skopos* theory, where translation is considered an act of communication across cultural barriers (Snell-Hornby 59). To bring the argument one step further, citing a user’s manual translation for her example, the Finnish translation theorist Justa Holz-Manttari even claims that translation is far from a linguistic transcoding process, as the purpose of a translation almost always lies

outside the linguistic contents of the source text (Ibid. 58). The guiding principle, for her, should be the purpose of the translation for the target audience and the client (whoever is retaining and/or requiring the service), and the translator does not need to treat the source text as a sacred original. Ostensibly, this view would *prima facie* work best for technical and specialized translation and not literary translation (Ibid. 59). Drawing upon the enterprise of semiotics and in defiance of the traditional view that translation is nothing but an operation through which data are transmitted, philosopher and linguist Terry Eagleton argues in his work *Translation and Transformation* that every text, original, translation or otherwise, is, in a sense, a “translation” in that it is a text, or a combination of texts, that previously existed, with no text being superior to any other in the hierarchy or the chronology (Bassnett 105). Undoubtedly, this is a claim about intertextuality made in an effort to forego the obsession with the dichotomous opposition between source text and target text. One of the most subversive views within the cultural turn would probably be the cannibalistic approach, a view proposed by Rosemary Arrojo of Brazil against the backdrop of post-colonialism, in light of the tension between the authority of the original and the autonomy of the translation. Arrojo seeks to show that translation, after having “consumed” and “absorbed” the original, is no longer just an activity that aims to preserve the intended meaning of the author, but instead the translator should take it upon himself to produce new meanings from the “food” (Ibid. 60-61). Some scholars even went one step further towards an extreme by claiming that the history of colonialism is also a history of translation, suggesting that the impact of translation in any socio-cultural context should never be neglected (Bassnett in Malmkjær and Windle: 99).

The cultural turn that translation studies took around 1990 was truly impressive. Indeed, the openness and interdisciplinary nature inherent in translation studies as demonstrated by the cultural turn has made the integration with most adjacent disciplines smooth and swift. The deconstructionist research under translation studies and that under cultural studies together have served as the link of translation studies and semiotics that ultimately facilitated their integration. One scholar, Doris Bachmann-Meduck, even went as far as to argue that there has been a “translational turn” across the social sciences and humanities in recent years thanks to a very successful cultural turn in translation studies, which weaned translation of its primitive status as a linguistic and textual practice, establishing its status as a cultural

and social activity, which is something much broader and larger (Bachmann-Medick in Gambier and Doorslaer v. 4 2013: 186). In fact, since most researchers of legal translation can agree that the law is a venue where legal culutremes roam and thrive (Bercea in Glanert 140), the cultural turn, thanks to its propositions on the equivalence in function to be fulfilled between the target text and the source text, can make a useful inspiration for all discourse on legal translation—including this research.

Indeed, the cultural turn, which started off less than three decades ago as just a modest attempt to overcome the rigidity of the principle of equivalence that had been prevalent in translation circles for too long, has changed and transformed itself into something very impressive and something capable of acting as an inspiration for many more recent paradigms and propositions (*Skopos* theory being one of them) that have emerged in translation studies. This is particularly evident from the enlargement of the scope of topics covered by the cultural turn, which range from the translator's identity, mediation between cultures, the translator as a mediator, translation and the media all the way to recontextualization, as is made obvious by Susan Bassnett with the layout of the headings in her book chapter entitled *The Translator as Cross-Cultural Mediator* included in *The Oxford Handbook of Translation Studies*.<sup>117</sup>

Now that we have gone over the cultural turn, let's take a look at our next turn, which is also an unprecedented turn of translation studies—and a landmark one too.

### **C. The Sociological Turn: The Perfect Paradigm?**

To begin with, unlike the cultural turn, which was mostly a school of thought that provided a powerful impulse and an unprecedented perspective for translation theory, the sociological turn is different in the sense that it involves the application of true, full-blown sociological methodology to the observation and explanation (and maybe even justification) of human translation activities. Before we get into the nuts and bolts of the possibility of an economic turn, however, we should perhaps first take a close look at the sociological turn and how it came to be what it is now.

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<sup>117</sup> Vide Malmkjær and Windle, 2011, pp. 100 *et seq.*



The sociological turn is probably one of the most reputable schools of thought of translation studies, with some academics going as far as to labelling it a “new sub-discipline within translation studies” (Wolf in Wolf and Fukari: 6). The development of translation studies brings into the spotlight an evolution of paradigms that underpin the theoretical hypotheses, research model and research methodology. More importantly, an old, outdated paradigm will always be replaced by a new one, which, in turn, feeds into the urge for translation theorists to distance themselves from their colleagues/competitors by continuing to carve out their own niches—usually by forming an alliance with other fields, as translation studies carries on with its struggle for its status as a mature discipline. This is, by and large, a rough description of the resolution to interact with sociology on the part of translation studies a good two decades or so ago.

To begin with, it is not just translation studies that has experienced a sociological turn; in fact, cultural studies, being a relatively complex enterprise—almost synonymous with interdisciplinarity, has seen a sociological turn too (Moran 50), and frankly, the reasons for this were many. For one thing, sociology is a social science that is highly flexible and receptive of theories and methodologies of neighbouring disciplines like political science and history, making it easy for it to form an intersection with a good many fields of research, and this includes cultural studies and law. Law and society, or the sociology of law, as some prefer to call it, for its part, has seen its share of wax and wane over the decades—even centuries, with the institutionalization of social scientific engagement with the realm of law following an uneven path of development from Weber and Durkheim all the way to the functionalist view of sociology of law in the USA in the 1960s (Gurvitch 2001: XII). However, in no way does this suggest that there have been no skeptics; some, in fact, are openly challenging sociology’s claim as a science despite its inception as such by French writer Auguste Comte in the early 19<sup>th</sup> century (Moran 60). Science or not, sociology has been enlisted by jurists, who realized that it was no longer sufficient to understand the law just by studying—sometimes only perusing—judicial opinions, in an effort to form the sociological jurisprudence movement, which, in turn, ultimately laid the groundwork for law and psychology (Roesch *et al.* 4).

As regards the sociological turn for translation, it all started in 1995, when Gideon Toury published his work *Descriptive Translation Studies and Beyond*. In this book, he argued that in order to make a generalization of a pattern of behaviour on the part of the translator vis-à-vis the target culture, the target culture needs to be studied, since, after all, translation is primarily conducted out of the needs and concerns of the target culture (Toury 1995: 28-29). For Toury, a norm refers to any regularity of behaviour in recurrent situations of the same type (Snell-Hornby 73). According to Toury, who considers translation studies an empirical science, translation studies must be studied descriptively in order to be in a position to claim authority and autonomy (Toury 1995: 1). And this, in turn, will require a target-culture-oriented framework for the field of translation studies (Ibid, 23). In plain language, what the sociological turn, a perspective that flourished because of descriptive translation studies, tries to promote is how the translator, as a social being, should translate in the society he is currently physically located in for the intended target audience. Towards the end of his book, Toury even proposed the idea that some *laws* must be established for translation studies if it is to be regarded as a science, where by “law” he is referring to theoretical formulations purporting to describe the relations between all variables which have been found relevant to a particular domain (Ibid. 259). It appears to be his belief that, in the absence of so stark a term like “law of translational behaviour”, translation studies, as a science, must be capable of developing, defining and refining its own “laws”, for a science qua science will always be in search of laws—and good and functional laws, for that matter (Ibid 259). At the same time, he does take the opportunity to lament some “pseudo-laws” that have been implanted in translation studies scholars’ brains such as generalizations and directives that do not deserve to be called laws at all (Ibid. 259 *et seq.*). Coincidentally, starting a few decades ago, legal scholarship and the legal profession both brought themselves to accept the position that since the law is an organic part of the greater society, it should definitely reflect—and be studied from—its underlying mores (Golan 2004: 212). This new perspective ultimately led to legal realism, a school of thought of jurisprudence that places emphasis on greater use of non-legal and, specifically, social science (this includes economic, of course), perspectives (Posner 2001: 3).

Given the open nature of sociology as a social science, it is no surprise that translation studies managed to form a friendly intersection with sociology, a field of inquiry that is

concerned with understanding, explaining, criticizing and improving the human condition (Tovey and Share 2003: 16). Sociology, which provided legal science with the methodology and perspectives that it needed for movements like legal realism, is certainly a source of inspiration and encouragement, which enthralled many law professionals and jurists. Further, theories and hypotheses must be tested against reality if they are to be of any use, and since sociology is an empirical science through and through that is keen on exploring social reality hands-on, it is in a position to work well with translation studies, a new discipline with open-minded people trying to ascertain the ins and outs of the phenomenon known as translation in the social context. Translation is not to be viewed and tested in isolation; instead, it is to be observed in the “complexity of societal realities” (Wolf in Wolf and Fukari 27). Only something like this will qualify as a thick description<sup>118</sup> of translation, being evaluated in action and in its context not divorced from surrounding realities. Furthermore, many seemingly irrelevant elements do actually have some bearing on the translation profession, and, thus, no translator can be considered a professional working in isolation any more than a piece of translation can be considered an isolated and haphazard transmission of ideas (Ibid. 28). Everything from the selection of texts, via the production and publication of translation all the way to the reception by the target readership all seem to be closely related to the broader societal context that strictly governs the translation strategies adopted by the translator and dictating the translation market (Ibid.). Essentially, the social implications in every personality trait of the translator and in every quality of the translation will always predominate.

Truth be told, many things yield to politics, and academia is no exception. The late 1980s and early 1990s saw a series of tumultuous political events around the globe that eventually led to the end of the Cold War on the international politics front. Meanwhile, on the academic front, after an exhausting and devastating Cold War, during which time a wholesale nuclear war was always a remote possibility, countries around Europe—and perhaps even worldwide—were starting to open up at an unprecedented pace, both politically and economically, both physically and psychologically. Add to this the fact that the European Union, which, having integrated the organizations of the EEC and then the

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<sup>118</sup> The concept of “thick description” originated in anthropology and spilled into translation studies in the form of “thick translation”.

EC, officially came into existence in 1993 by virtue of the *Maastricht Treaty*, was embarking on its ambition to expand across the whole continent of Europe, the need for more translators for more translation projects all of a sudden became more serious than ever before. At the same time, in response to this change in circumstances maybe, many university graduate degree courses and programs sprung up, which eventually led to, as Snell-Hornby claims, “disciples making a mark on the discipline and not just their masters” (Snell-Hornby 70). In a broader sense, though, the urgent need for translation over the last two decades or so has not been able to guarantee high-quality translation, legal or otherwise, and nor has it clarified the relevant contexts mandating translation, let alone a good translation; instead, all it has done is adversely contribute to an already overwhelming backlog and heavy workload for translators.

That said, however, despite translation studies’ apparent victory in its struggle for full status, its disciplinary profile (i.e., whether it should be an independent, integrated or interdisciplinary subject) was now brought into a clearer focus. Due to translation studies’ involvement with a range of neighbouring disciplines, and also in the wake of the yawning gap between theory and practice maybe, heavyweight scholars like Toury proposed that a field as complex as translation studies be categorized as an “interdiscipline” (Ibid. 71), which apparently has won industry-wide recognition. In this respect, expectations were exceeded.

As a descriptive methodological approach to translation studies, the sociological turn was exceptionally successful. Viewing the entire system of translation as a social one, Toury managed to explain everything—the translator (a social being), the target culture, the source culture along with the broader context they find themselves in—from a sociological perspective, which requires the extensive application of norms in the broader context of socialization. Norms, or more precisely “translational norms”, are broken down into many different types, and the final decision, more often than not, will involve some compromise between the two extremes (Ibid. 73-74). Simply put, it all ultimately depends on the needs and wishes of the target culture (Ibid. 74). Of course, whenever we speak of social norms, things like peer pressure and group behaviour will immediately come to mind, and while they in a way enjoin people to “conduct themselves accordingly”, they, at the same time,

have the potential of creating a minefield of fuzzy constructs. Some ramifications started to emerge out of the sociological turn starting in the 1990s partly because of this, power and translation being one of them. The concept of power was able to give the sociological turn the boost in morale. The translator has his interests, goals and political ends to pursue, and, as such, he is far from impartial, sometimes finding himself caught between power groups against their wishes (Tymoczko and Gentzler xxiii). Fields such as postcolonial translation and feminist translation are also among the fields inspired by the cultural turn (Ibid. 164).

All in all, regardless of people's views on norms, on loyalty and on faithfulness to whichever culture, one thing is for sure: language is now uprooted from its central place in research on translation, with the focus now shifted beyond language (Snell-Hornby 79). This is quite obvious in the works of Nord, Hermans and Wolf, just to name a few.

#### **D. Turns and Interdisciplinarity—Synonyms?**

Indeed, interdisciplinarity could be a good way of filling up the gap between theory and practice, not just for translation studies, but also for other disciplines, law being one of them. For so many years, translation theory has undergone repeated unearned accusations of being unrealistic and utopian, and so has the study of law. The truth is we will never get to understand how the criminal justice system works in real life until we understand not only what black letter law says (“No searching or frisking without a warrant”) but also what actually happens in practice (How does the police carry out their duty? As a quick example, empirical research on police behaviour often offers surprising results that reflect police brutality here and there) (Adams and Brownsword 30). However, we should be cautious that even in the event that empirical research reveals a persistent discrepancy between prescription and behaviour, it does not necessarily mean that the statutory prescription is wrong and should be changed; instead, it simply means that the relationship between theory and behaviour is actually more complex than we first thought (Ibid.). The philosopher of science Karl Popper once argued that scientific theories can never be established as facts; they can only be proven false (or “falsified”). But in reality, the truth is a distant point that scientists can only work hard to get closer to, and that is it. In order to achieve all this,

fields of inquiry need to form turns and/or interdisciplines with each other. Now, we must now ascertain the difference—if any—between a turn and an interdisciplinary approach.

True, since its inception, translation studies has always been rather open-minded about the idea of interdisciplinarity, and it is clear that a fairly lively interdisciplinary trend has intensified in recent years. Now comes the question: What do we mean by an “interdiscipline”? Does it indicate a stretch of “no-man’s land” sandwiched between/among/beneath other clearly defined subjects, or does it constitute something qualitatively different from the summation of its components through some chemical reaction? Is it a lost paradise discovered or just an old rug to sweep dust under? More broadly, why is it that while forming an alliance with other related/adjacent disciplines seems to be a trendy thing to do, only in translation studies circles is the term turn (instead of interdiscipline, alliance, interface...etc) used so extensively? And what about a turn? Could it be a change of front for an academic field?

For one thing, it goes without saying that in the humanities, interdisciplinary projects are an especially important contribution to the rise and subsequent establishment of “turns”, which question both existing paradigms and allegedly definitive certainties, and additionally offer innovative potential for productive new research areas and methodologies (Wolf in Wolf and Fukari 2007: 2). On this, there is much heated debate among translation theorists (Snell-Hornby 72). Interestingly enough, in the work *The Turns of Translation Studies*, which is cited extensively in my research, the author Snell-Hornby has *The “Interdiscipline” of the 1990s* (note the quotation marks) for the title of Chapter 3 (Snell-Hornby 70) and *The Turns of the 1990s* for the title of Chapter 4 (Snell-Hornby 115), meaning that, for her at least, the two terms must be interrelated or even interdependent in some way to be placed in such close succession, while at the same time, there still might well be a slight discrepancy or narrow gap in between. However, surprisingly, nowhere in her book did she bother to define what the word *turn* meant in black and white for translation studies.

Having briefly discussed the meaning of “interdiscipline” (and all its lexical derivatives), in order to be able to decide if the two terms refer to the same thing, and if not, how much they overlap each other, we have to work out one other thing. What do we mean by “turn”?

Interestingly (or sadly), despite the extensive use of this term across the translation studies circle, the term itself has never really been clearly defined by anyone; everyone seems to assume that it must be fully understood, or at least tacitly implied, owing to its extensive use. Some have argued that the virtues of interdisciplinarity have often been touted in many areas with but a vague sense of what the term means, and how existing disciplines are to be challenged and transcended (Moran 81). Thus far, the future does not look very bright.

Of course, “interdisciplinary” and “turn” will both be no more than empty words if we are not sure what they mean. The truth is, to a great extent, the two terms seem to go hand in hand in much of translation studies literature whenever some intersection is under discussion. For example, in her work *The Turns of Translation Studies*, Snell-Hornby started off with *The Emergence of a Discipline* for her first chapter, going on to *The Cultural Turn of the 1980s* for her second chapter, before ending up with *The “Interdiscipline” of the 1990s* for her third chapter, which more or less suggests that, at least for her (and probably for much of her readership across the translation studies enterprise), the term “turn” entails the concept and practice of interdisciplinary research to some extent (Snell-Hornby 2006). Additionally, in his work *Interdisciplinarity*, the author Joe Moran has a whole chapter dedicated to a “turn” that happens to be termed *The Sociological Turn* (Moran 2006: 60-66), which also feeds into our current hypothesis.

But, again, more to the point, what exactly do we mean by a *turn* in the academic sense? One might have to browse through literature on translation turns for an answer, which will have to be made by inference anyway. If we take a closer look at the chapters of Snell-Hornby’s work *The Turns of Translation Studies*, in which two out of the five chapters have the word *turn* in them, then we might realize that it seems to indicate any change, alteration or shift in the approach to a certain problem or just in the mindset/mentality of the translator, and it does not necessarily have to be methodological. For instance, listed are the “globalization turn” (Ibid. 128), empirical turn (115) and Venuti’s dichotomy of foreignization and domesticating (despite the absence of the word *turn*) (Ibid. 145), on top of the all-too-familiar cultural turn (Ibid. 47 *et seq.*). Next, for her, it all boils down to two basic types of turns in translation studies: methodical turn and the type of turn that is made possible by state-of-the-art technology and globalization in conjunction with the

employment profile (and possibly also the social status) of the translator (Snell-Hornby 115). In Chapter 3, she lists as interdisciplines subjects of research like gender-based translation studies (Ibid. 100), which is an intersection between translation and gender studies, and postcolonial translation (92), which is an intersection between translation and postcolonial studies and also the “Third Space” perspective, which was first brought up by Harvard post-colonialism professor Homi Bhabha (95). Bhabha even proposed a “translational culture” as a new venue of cultural production from which “newness” enters the world (Bhabha 1994: 212). Interestingly, the common thread throughout these three perspectives seems to be translation and power and power relations (cultural, political and economic), which will, in turn, inevitably invoke the question of ethics.

In light of all these facts, one might be able to make sense of the term—however tentatively—“turn” as any shift in perspective on the part of the translator without any methods from another discipline necessarily being involved. But, indeed, appearance can be deceiving. In fact, to my dismay, Wolf indicated in her paper *The Emergence of a Sociology of Translation*, which serves as the introduction to the larger book title *Constructing a Sociology of Translation*, that in writing that paper on a sociology of translation, she intended to “improve the conjunction of translation studies and sociology and thus foster the development of a methodological basis”, and the potential of such a discourse is “best shown by drawing on the concept of interdisciplinarity” (Wolf in Wolf and Fukari: 2). In that case, then, apparently, there is more to the sociological turn than meets the eye; arguably, the sociological turn is an enterprise that not only exploits the intersection of translation studies and sociology, but it also actually goes as far as to observe and explain the translation phenomenon by means of sociological methodology with a view to establishing an interdiscipline that has equally close ties with both fields. If that is really the case, then it appears to me that the interdisciplinarity as featured here would be no different than that featured in the sociology of law—the interface between law and sociology. Thus turns and shifts are admittedly just two visually manifest forms of interdisciplinarity.

For the sake of evidentiary confirmation, perhaps we can now focus on gender for a moment. Human sexuality as analyzed by Michel Foucault, is a cultural construct



intertwined with a host of factors—including but not limited to—power, mental state and knowledge, and this is exactly what makes gender studies interdisciplinary (Moran 108). Moreover, as an integral part of culture and ideology, gender made its way into translation studies by way of the cultural turn before eventually establishing its own “turn” within translation studies (Simon 1996: 7). Since translation studies does engage itself in disciplining and mapping knowledge, and since it is much more concerned with the discourse and knowledge that shape translation as an integral whole than merely with the fine and minute craftwork of fragmental pieces of translation works completed by individual professional translators who happen to live and survive in a setting featuring just as many social factors (gender, age, status of economic development...etc), translation studies could even be treated as a “double-interdisciplinary” field.

The idea of mapping knowledge onto knowledge can probably be traced all the way back to Aristotle, who managed to organize different subjects into a hierarchy of theoretical, practical or productive categories, though not completely without controversy (Moran 3). Of course, this was done on the assumption that human knowledge could—and should—be broken down into segments and then put into categories according to some identifying trait. In this regard, there might be several options—imperialistic interdisciplinarity, importing interdisciplinarity and reciprocal interdisciplinarity (Snell-Hornby 72). First off, imperialistic interdisciplinarity implies that the relation is unidirectional, with only one discipline imposing its concepts and theories on the other; importing interdisciplinarity implies that one discipline acts as the tool and method supplier for the other, as is the case of law and economics (disputed); then at the third and highest level in the hierarchy is reciprocal interdisciplinarity, which is an arrangement that benefits both disciplines. Some are of the opinion that translation studies ought to reconsider its current practice of instrumentalizing the research methods of other disciplines and instead try encouraging cooperation on a reciprocal basis (Wolf in Wolf and Fukari 2), indicating that translation studies is probably still an importing interdiscipline, if not just an imperialistic one. Surprisingly, however, some insist that the sub-discipline of comparative law within law could benefit from translation studies by making the latter (translation studies) a lens and frame to its advantage (Hendry in Glanert 93). If this is really the case, then the third model

of interdisciplinarity, i.e., reciprocal interdisciplinarity, will apply to translation studies and (comparative) law.

Quite understandably, in many areas throughout academia, it is taking some getting used to for the “powers that be” to fully accept interdisciplinarity. Some have gone as far as to acknowledge a series of potential “border wars” between economics and other social sciences as to the proper limits to the application of economic principles to all human phenomena (Reder 342). Law and language, for one, had to come a long way, whereas law and economics, a distinct and important subfield of legal theory boosted by the incorporation of game theory into economics, has rendered itself as one of the most important developments in legal scholarship of the twentieth century that is expanding and looking in new directions in recent years with traditional theories being put to empirical tests thereby winning approval and appreciation from the fields as diverse as psychology and sociology (Salzberger 2008: 222). The works accumulated over the 1970s and 1980s from a number of different areas contributed to the founding of law and language, with sociolinguistics and the sociology of law being two of the prominent ones (Conley and O’Barr 9). While law and society, or the sociology of law, as some prefer to call it, is an interdisciplinary field that attempts to understand the connections between law and its social context (Ibid. 11), sociolinguistics is the branch of linguistics that studies the correlation between language and its social context (Ibid. 10). Seen from this perspective, law seems like a rather flexible subject owing probably to its methods of reasoning that are multidimensional but not linear (White 1990: 80). In any case, I think that for jurilinguistics, or law and language (as a subject), to have to make a detour like this involving two separate interdisciplines might be both encouraging and distressing for the potential interdiscipline of translation and comparative law, or even that of translation and economics.<sup>119</sup>

Thus, apparently, at least for Conley and O’Barr, an interdisciplinary field loosely refers to any academic enterprise that strives to understand the connections between its two (or more) relevant subject matters. Of course, the idea of interdisciplinarity itself cannot be

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<sup>119</sup> Of course, in a sense, because of this detour involving so many scholarships, law and language is a “double-interdiscipline” through and through.

understood without a thorough inspection of all relevant interdisciplines—along with their epistemologies—concerned (as we know and define them), since an interdisciplinary approach will always involve an engagement with the two (usually two, sometimes three) stand-alone disciplines and the modes of knowledge that they exclude by virtue of their separation from each other (Moran 2006: 2). On this, translation theorist Michaela Wolf concedes that all controversies arising from interdisciplinary work simply reflect the inherent “differences that exist between scientific disciplines with regard to their structural characteristics” (Wolf in Wolf and Fukari 2).

Granted, in any case, it appears that some shifts and turns work better than others, and we should always be mindful that interdisciplinarity might not always have a resolution for our dilemmas. Due to long-held provincialism maybe, asymmetries between disciplines abound that are the result of observation of the same realities with very different connotations (Noreau 11). This is a problem for all interdisciplinary enterprises, and overcoming it will indeed take some time. More specifically, as a case in point, by means of his public choice (or social choice) theory, James Buchanan made an half-baked attempt at reviewing political phenomena through economic lenses, while University of Chicago sociologist James Coleman made considerable contribution to socioeconomics by means of a rational choice model, providing a potential firm link between sociology and economics. Yet, despite all these efforts, it is widely acknowledged that while economics has worked for and with law very seamlessly, it has not worked quite as well with other social sciences like, say, sociology and political science (Hsiung 23-24), and it has worked even worse (if at all) with psychology (Reder 358), and academics who have embarked upon an endeavour on the latter two have mostly encountered at least some frustration. It thus appears that law and economics wins over all others hands down in regard to engagement of economic methodology. And the results speak for themselves; currently, there are many more scholarly journals on law and economics than there are for the other two interdisciplines.<sup>120</sup>

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<sup>120</sup> This in no way suggests that an economic analysis will never work for political science. As Georgakopoulos points out in his book *Principles and Methods of Law and Economics*, economic models have made their way into political science, sometimes via law and economics, but never very persuasively. *Vide* Georgakopoulos, 2005, pp. 38-39.

In this respect, economics is at fault too. On a narrower scale, economics, for its part, cannot provide equal insight and understanding for all sorts of human behaviour (Becker 1976: 9). As we shall see, currently, even economists are having second thoughts about the excessively prestige attached to their discipline, with some going as far as to argue that there is no sufficient justification for the irreconcilable divisions between economics, sociology, economic sociology and economic geography. Instead, a minimum understanding of interdisciplines such as economic history, the history of economics, and the philosophy of economics would be essential, and, as a result, economists must learn to read and appreciate works from neighbouring academic disciplines.

Today, interdisciplinarity seems to be at its historical height. In the circle of comparative law, for instance, it is becoming more and more difficult for comparatists to downplay, much less outright ignore, the relevance of translation studies and linguistics to their field (Glanert 2014: 10). Thus, even in the realm of law, an age-old discipline that has enjoyed respect and prestige, there have been some calls for cooperation with or perspectives from neighbouring disciplines known as “turns”, such as a *literary* turn, as demonstrated in Richard Posner’s book *Law and Literature* (Posner 303). In yet other contexts, where the declaration of a turn was never heard, some intellectual developments in legal theory could still be attributed to thinkers from outside of law, such as Kelsen and Hart, both of whom were philosophers (Noreau 9), or political scientists, such as MacCormick (Ibid.) And I think that this is something very remarkable. It is truly remarkable that interdisciplinary inquiries should have so much to teach about the nature and the function of law, and a detour into the epistemology of science can reveal the distinction between normative and analytic thought, giving a foothold to the claim that law (or legal science) is a science (Ibid.).

New paradigms through exchanges of “glances” (this includes the clash of opinions that sometimes ensues) and changes in viewpoint, as Mary Snell-Hornby asserts, is definitely a must for the young and tender discipline of translation studies, and this may involve something more revolutionary than just an adjustment to a familiar concept (Snell-Hornby: 2). Translation studies is (or *should be*) a very open, outward-looking, purpose-oriented subject, and thus a constant search for new disciplines to work with should be on its

agenda, and economics should definitely be part of the search for these obvious reasons. First of all, in a nutshell, as a science, economics studies and explains concerns of human beings from all walks of life, getting down to the very core of human existence. One major goal of economics in regard to any particular society is equilibrium<sup>121</sup>, a steady state, relative or absolute, where no one has any compelling reason to change their current or habitual actions. An equilibrium is often so important to economists that they sometimes go out of their way to establish one by explaining seemingly routine phenomena in a quantitative way with the help of models that are typically made up of three-dimensional diagrams and mathematical formulae. This, I believe, could shed some light on translation studies.

As far as interdisciplinary scholarship is concerned, thus far, there have been, among others, the sociological turn, the cultural turn and the ideological turn, with no “economic turn” yet in sight in spite of the potential benefits to translation studies. To add insult to injury perhaps, translation studies has been aggressively engaging in more turns, this time an “interdisciplinary turn”

(Gentzler 2003), characterized by new paths of inquiry, and a “technological turn” (Cronin 2010), created by state-of-the-art computer tools and interaction with information Technology (IT). In this sense, therefore, a turn presupposes interdisciplinarity and an interdiscipline inevitably entails a turn for at least one of the disciplines involved. For their part, economists do acknowledge that their discipline is engaged in a bold attempt to “expand the range of phenomena to which its expertise can be applied” (Reder 361). And their efforts have not gone in vain; in fact, far from it, as economics has been enjoying considerable success despite some resistance from disciplines whose territories are being invaded inchmeal. In sympathy with this trend, my research attempts an application of economic ideas to translation studies, because I believe that economics should be part of the list of subjects from which new insights on legal translation can be derived. And this will be my contribution.

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<sup>121</sup> Once again, I would like to emphasize that the term *equilibrium*, as employed and understood by economists, is slightly different from the one in everyday language, which is but an antonym of *disequilibrium*, meaning imbalance and disharmony among certain individuals.

### **E. Solipsism of the Translator: An Economics for Translation?**

Solipsism is not unique to economics (Legrand in Glanert 214). The hard fact is that if even a “sociological eye” for translation can be a “secondary” view for some despite the social/societal nature of translation, as some scholars fear (Wolf in Wolf and Fukari<sup>13</sup>), then an “economic eye” is probably not even a tertiary view, if it even exists at all. Yet, truth be told, there is always more than one way of observing and making sense of a phenomenon, be it heinous crime, water consumption, air pollution, music or translation. Just as the sociological turn looks at translation from a unique perspective, so does the cultural turn, as well as, hopefully, the economic turn. Ontologically speaking, economics is no more merely a set of questions and answers than sociology is; instead, what an economic approach will lead to depends not just on economic theory but also on the facts of the real world to which the theory is applied (Friedman 2000: 317). There are two basic assumptions that economists make about human nature: people are rational and they are also self-interested. Rational choice theory, the theory about the rational nature of human beings, is at the heart of modern economics and in the areas contiguous to economics, such as some parts of political science, sociology, history and law. While there is no one-size-fits-all definition for rational choice theory, there are two important aspects to its subject matter. First, in the informal sense, a choice is said to be rational as long as it is deliberate and consistent; second of all, in the formal sense, people have transitive preferences<sup>122</sup>, and they seek to maximize the utility that they derive from those preferences, subject to certain constraints. This, I think, makes a good description of the translator.

In more specific terms, from the standpoint of the translator, translation and its context/environment can be methodologically framed in many diverse ways, sociologically and economically, each of which might entail very different consequences and implications. Truth be told, as Snell-Hornby so sharply points out, what has remained mostly unchanged over the past decade or two, despite diversified university curricula and sophisticated technology, is the social status of translators as perceived by the general public and the standing of the academic discipline of translation studies in academia, and it

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<sup>122</sup> In the mathematical sense, a binary relation  $R$  on a set  $X$  is said to be transitive if and only if  $xy, yz \in R \Rightarrow xz \in R$ ,  $\Rightarrow$  for all  $x, y, z \in X$ , where ordered pairs in  $X \times X$  are written by juxtaposition. In plain terms, if a value  $x$  is greater than  $y$ , and  $y$ , in turn, is greater than  $z$ , then one can conveniently reach the conclusion with absolute certainty that  $x$  is also greater than  $z$ . *Vide* Peter C. Fishburn, 1979, p. 163.

is therefore imperative that academics work hard and make every effort to remedy this situation (Snell-Hornby 174-175). Hence, apparently, all the turns and shifts that have been established for translation studies, as well as the interdisciplines that translation studies has had to create with the help from other disciplines, all feed into the same ultimate goal: a greater exposure for translation studies as a field of study and higher prestige for translators.

Unfortunately, however, economics still seems like a far-fetched subject for many in translation studies. In her paper chapter entitled *The Emergence of a Sociology of Translation*, which has been repeatedly cited herein, Wolf is a frontrunner in the struggle for a comprehensive and all-inclusive discipline of translation studies with as many areas of study as possible, including cultural studies, linguistics, literary studies, historiography, philosophy and sociology (Wolf in Wolf and Fukari: 2)—still with no mention of economics at all. Clearly, for her, like for most translation scholars at this point, economics or a form of alliance between translation studies and economics never crossed her mind. Apparently, Wolf, just like many of her fellow translation theorists, failed to realize that whenever several candidates with similar status are fighting for a certain exclusive privilege or benefit, or whenever a person is confronted with more than one option, of which he is allowed only one, then they can be described as being in the presence of a market where every individual is fighting for something of limited quality by doing the best they can. This is one of the central arguments that Becker outlines in his landmark work *The Economic Approach to Human Behavior* (Becker 10). This, at the most primitive level, would be one of the premises of an economic turn of translation.

However, this in no way suggests that the word *economics* never rang a bell for any translation theorist. As mentioned before, economic methodology was looming somewhere in the background—perhaps very vaguely and in a distorted way—in Jiří Levý's work despite his apparent misuse of it. Also, in their paper *Outline for a Sociology of Translation*, the coauthors Johan Heilbron and Gisèle Sapiro did repeatedly use the words *economic* and *economics* throughout their paper, which was, ironically enough, supposed to be an endeavour to strengthen the status of sociological methodology in translation circles. However, what economics means to them in connection with translation is utterly different

from the mainstream understanding of economics among economists, and thus there might be only limited interdisciplinary application in their research. More specifically, however biased it may seem, economics for them is synonymous with the permanent profitability of translated works and day-to-day marketing strategies for translation service operations (Heilbron and Sapiro in Wolf 98).

As a case in point to draw an analogy from, cultural economics seems to work as a double-edged sword, as any attempt to apply economics to the arts (assuming that translation is an art) will likely be interpreted as an “early sign of senility” (Peacock 22). The truth, however, is rather appalling and disappointing. As Peacock so poignantly points out, as musical composition is not a high paying niche in music, earnings precarious relative to the necessary training and education, government patronage and funding has become something taken for granted (Ibid 26). Economic models of a competitive economy, meanwhile, also reveal that without any external support, some features of music production and consumption might end up getting ignored in the end in the name of the “greater good” with little concern for factors that are considered too lofty like the country’s cultural image on the international arena. In short, this is an externalities problem in the sense that as musicians and music product suppliers all constantly provide the greater society with a great deal of perks and benefits (TV programs to watch in the privacy of one’s home, theme songs of dramas, radio broadcast to listen to while driving...) despite their inherent inability to collect the benefits they contributed to (which resonates with the economic concepts of externality), composers must be subsidized (which resonate with the concept of internalization).

As brought up previously, the only person who has at least attempted to face up to economics head-on in a similar way, however tangentially, was Jiří Levý, who, in his work entitled *Translation as a Decision Process*, made a first-ever attempt to apply game theory<sup>123</sup> to the translator’s repeated task of making choices, which will eventually have a bearing on one another (Levý in Venuti 2000: 148). Even more dramatically, he and his proposition even received “official endorsement” from translation studies scholarship in the

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<sup>123</sup> Game theory, as developed by John von Neumann and subsequently improved by John Nash, was originally a mathematical theory, but at the same time, it has also turned itself into a technique applicable to paradigms “instead of a paradigm itself”. *Vide* Reder, 1999, p. 108.



form of an entry (which was a contribution made by Michael Cronin) in the *Routledge Encyclopedia of Translation Studies*, edited by Mona Baker (Baker 2008: 91-93). And yet, however startling it may sound, this, in fact, is not what game theory is really about; or more precisely, the activity happening in the translator's mind in the course of his translation, as depicted in Levý's illustration, does not constitute a game in the real sense—far from it in fact. In my opinion, it, in fact, amounts to little more than a personal touch on bounded rationality, a concept developed by Herbert Simon, an economist who won the Nobel Prize in economics in 1978 for his research on the decision-making process within economic organizations.<sup>124</sup> Basically, what bounded rationality is all about is the need to compromise when making decisions, as people oftentimes do not have sufficient time, information or resources to maximize their utility to the fullest extent<sup>125</sup> in the way a rational and self-interested *homo economicus* (lit. “economic man”) is ideally expected to. Initially, it was introduced to question the conventional assumption of optimal action based on complete information on the part of all parties to a game given that empirical evidence has shown us time and again that individuals do make systematic errors by failing to take into account some available information (not to mention that there must have been some information *unavailable* to them at the time of decision) (Georgakopoulos 59). Human beings, as a creature of God, do come with limited computational skills and flawed memories, and even with remedies that they devise in an attempt to deal with these imperfections, human behaviour still deviates from that predicted by the “standard” model of unbounded rationality in the *homo economicus* (Sunstein 2000: 14).

All things considered, to take our argument one step further, Levý's model of a “game” would have slightly resembled a Stackelberg game in that Levý was clearly focusing on the interaction between two separate decisions made at different stages that may be interdependent, where a Stackelberg game, developed by German economist Heinrich Freiherr von Stackelberg, is a game where the players concerned take turns acting and reacting, never to make their moves at the same time (Gravelle and Rees 350). Of course,

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<sup>124</sup> Granted, as noted by economist Georgakopoulos, the analysis of bounded rationality is yet another branch of law and economics that has made use of game theory (Georgakopoulos 59), but this does not vindicate the misuse and misunderstanding of game theory by Levý.

<sup>125</sup> As Reder so figuratively claims, utility, in the context of economics, can also be thought of as “want satisfaction”. *Vide* Reder, 1999, p. 44.

even such a proposition made in his favor will need some elaborate calculation and/or argumentation, and even then, such a game would still require at least two players.<sup>126</sup>

Furthermore, if anything, bounded rationality goes against the fabric of game theory in that game theory generally assumes that all players have equal and unbounded memory capacity, and it is not until fairly recently that games with players with bounded rationality are starting to be studied (Gravelle & Rees 360-361). Therefore, to my dismay, much as I appreciate Levý's efforts, I cannot say that he managed to fully understand game theory and make use of it properly, and it is my position, therefore, that, to this end, economics—or even just game theory itself—must be re-considered and (re-)enlisted for it to have any bearing on legal translation research at all.

Economics is, once again, a social science and behavioural science good at explaining human behaviour that involves decision making and strategic planning. It does so with a host of paradigms, around which a body of knowledge is organized, where the term *paradigm* refers to any set of interrelated propositions that are widely accepted, together with a specification of the procedures by which they may be revised (Reder 16).

Essentially, paradigms serve to distinguish research whose results are considered acceptable from research whose results are not (Reder 16). Whatever the paradigm adopted, an economic perspective, starting off from incentives as a point of departure, aims for ultimate efficiency and utility (Jackson in Rauch 37). Economics so studied and applied will certainly yield new insights on virtually any human behaviour, and this, in my opinion, is what an interdisciplinary link between translation and economics should be predicated on.<sup>127</sup> Economics will even get something out of it too, since, according to quite a few leading economists, economics will benefit from its own openness to ideas and a research methodology combined to produce a body of research that expands throughout and even

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<sup>126</sup> The Stackelberg game is a game where, for example, Firm A starts by producing a certain quantity of a widget today, to which Firm B must respond by deciding how many units to produce in order to maximize his own profits tomorrow. In the end, it may or may not yield a Nash equilibrium. Of course, an in-depth investigation of Levý's understanding of translation potentially as a Stackelberg game is probably beyond the scope of this research and will require another stand-alone paper.

<sup>127</sup> As a side note, again, coincidentally and ironically, while interdisciplinarity is something to admire, it does not work equally well for every pair. Economists and sociologists alike have confessed that the dialogue between sociologists and economists is merely in the "growing" stage with no culmination of their efforts in sight yet. *Vide* Jackson in Rauch, p. 38.

beyond the traditional boundaries of economics; the benefits will be bi-directional and not just unidirectional (Heckman 2015: 2).

#### **F. Potential Challenges to Interdisciplinarity**

Despite the bright and promising prospect that the idea of interdisciplinarity opens up to, there are, surprisingly, challenges to the idea of interdisciplinarity at the same time, which eventually ties back to the origins of the idea of interdisciplinarity itself. For one thing, while some claim that the idea was created by the Social Science Research Council in the 1920s, others attribute the idea to the general education and core curriculum movements that took place in the US in the early 20<sup>th</sup> century (Klein 2). This was just the beginning.

More specifically, translation studies, as an interdiscipline, emerged in a handful of small-to-medium-sized countries (such as Finland, Belgium, the Netherlands and Israel) with a relatively high HDI (human development index) reading in the 1970s and 1980s—and with good reason. Academics in these countries, which were all highly bi-/multilingual, were determined to unite miscellaneous elements from previous approaches into a single framework (Heilbron in Baker 316). This is probably one main reason why a good proportion of the most heavyweight translation scholars today come from these countries. There is, thus, no doubt that translation studies has benefited from a firm liking for interdisciplinarity among academics.

However, while the idea of interdisciplinarity may have a promising future thanks to its capability of broadening the translation research field, it does come with its fair share of potential challenges. For one thing, as Moran straightforwardly points out, there may be human intellectual limits to interdisciplinarity (Moran 182). To be frank, most research is undertaken by scholars trained and knowledgeable in only one discipline, and it may be difficult for them to conduct serious research and produce rigorous theories in another discipline (or in something beyond their “comfort zone”) without significant gaps in knowledge or logic. Moreover, it is likely that interdisciplinary thinking may be more prone to error, disorganized than established forms of knowledge (Ibid.). In addition, interdisciplinarity could disrupt the current smooth boundaries demarcating the

conventional disciplines thereby calling many of their claims and propositions into question (Ibid.). True, different disciplines (such as law and sociology) may want to tackle the same set of issues, but they have to work from very different premises due to their distinct methodologies and perspectives, and therefore, we must never naively assume that an interdiscipline would ever be able to transcend all individual disciplines involved and provide logical and persuasive answers for those who are discontented with conventional disciplinary boundaries.

Of course, there are some field-specific implications for translation studies. Some translation scholars already seem worried that with so many paradigms and frameworks flooding into translation studies from so many neighbouring disciplines, translation studies might not have the substance and perseverance to fend off potential fragmentation of the discipline (Munday 12). If this ever happens, it will be devastating for translation theorists indeed. In more real terms, advocates of the sociological turn of translation studies, a highly acclaimed school of thought in translation studies, do confess that, despite their undaunted enthusiasm for their object of research, embracing sociological methodology and integrating it into research on translation will inevitably call into question some established paradigms in translation studies, which will, in turn, require some serious reconsideration and re-definition of quite a few long-held principles and values that are so entrenched in scholars' minds (Wolf in Wolf 27). However, I prefer to see it slightly differently; to me, challenges like this one is very common for interdisciplines and by no means specific to the sociological turn of translation studies.

Inasmuch as interdisciplinarity concerns legal translation, it seems to provide us with some promising insights that may lead to new prospects on methodology at the same time. As well, inasmuch as translation studies is to be treated as an empirical science, as James Holmes would have wanted, economic methodology cannot be ignored. True, not all disciplines claim to be—or pretend to be—science, but those that do, with few exceptions, typically adhere to the canon of openness (Reder 18). So, now let us have a look at my proposition on economics and legal translation, and possibly on economics and translation studies in general.



### **Chapter Three: Economics and an Economics for Legal Translation (and for Translation Studies in General)**

The man of the future is the man of statistics and economics.

Oliver W. Holmes

Supreme Court of the United States justice, 1897

*Ignorantia legis non excusat.* (Lit. “Ignorance of law is no defence”)

(Ancient legal proverb)

#### **A. Background**

Translation is an activity platform, sometimes profitable and sometimes less so, that involves a wide range of participants which includes the author, the reader and the publisher, just to name a few, in addition to the translator himself. These parties are, in turn, interdependent on each other and must hang together as a group for the sake of their common interests and mutual benefits. This should be obvious by now in light of the purpose that the turns and paradigm shifts proposed by so many translation theorists over the past three decades are meant to serve; in fact, this is precisely one of the key underpinnings of everything that has transpired. It is probably because translation involves not just the author and translator but also third parties (all of which are sometimes categorically referred to as “agents”) like the potential target reader that the translator must take into account the needs of everyone affected, and it is precisely because of the general status of translation as a venue where so many different parties/agents meet, cooperate and clash with one another that compliance with prevalent social “norms” of the day becomes necessary. This was, after all, the point of departure for the sociological turn, which subsequently managed to expand into primarily sociological topics such as class stratification and power relations by treating prevalent rules that are usually overpowering as one key social factor in its pursuit of the true nature of translation.

At the same time, let us not forget that for a piece of translation work to come into existence and win acceptance, there will have to be some costs incurred, for there is, as the popular saying goes, “No free lunch”<sup>128</sup>. In this vein, sociological as it may be, translation can also be an object of research for the economist, for economics supplies a useful tool for evaluating and allocating resources (this could include money and time, as well as intangible resources/values such as love and compassion) among a multitude of participants/players<sup>129</sup>, but just with one fundamental assumption: the rationality on the part of all human beings. Two of the fundamental assumptions for the economic approach that are absolutely necessary are rationality and self-interestedness on the part of all human beings (Friedman 2000: 8), and this is what David Friedman has to say about this:

A mugger is a mugger for the same reason I am an economist. Given his tastes, opportunities and abilities, it is the most attractive profession open to him. What laws are passed, how they are interpreted and enforced, ultimately depend on what behaviour is in the rational interest of legislators, judges and police (Friedman 2000: 8).

Simply put, it is all about value and choice, two very subjective and ambiguous concepts. Indeed, translation is not something for the faint of heart; it is a highly specialized and stressful task that comes with an *ad hoc* purpose and a raft of formidable challenges. At the same time, the translator is no innocent and benevolent philanthropist either. The translator, under specific circumstances, must be someone who is well aware of his own needs and the expectations of everyone around him—the author, the target reader and the publisher—involved in his line of duty. He will then have to avail himself of the resources and choices available to him in compliance with the levels of speed and accuracy required of him, being well aware how to “get the most out of it”, which translates in economic terms as *profit/utility maximization*.<sup>130</sup> How, then, is the translator not a rational human being who has his personal agenda, hidden or overt, to pursue? This is no longer a secret (Gentzler in Tymoczko and Gentzler: 216). In fact, quite a few translation scholars make no bones about the fact that translators and interpreters do have vested interests, political ends and

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<sup>128</sup> Also widely known as the TANSTAFL principle in the trade.

<sup>129</sup> For my research, I will—however tentatively—treat the term *agent*, as it is used in sociology, and the terms players and participants, as they are used in economics, as near counterparts.

<sup>130</sup> This could be a real-life manifestation of consumer sovereignty and producer dominance at play—even arriving at a contradiction, depending on one’s standpoint. More on this will follow.

economic goals to pursue and, rightly or wrongly, often find themselves caught between the author and the reader with ambivalent roles to play (Tymoczko and Gentzler 2000: xxiii). Such a claim would definitely set the perfect foreground for an economics of translation. As a side note, by the way, the term *translation* is in regular use outside translation studies—more often than our intuitions may suggest. For example, in his work *Law in a Market Context*, Robin Paul Malloy used the word *translate* to indicate “transfer” or “change” (Malloy 163), and then again, on page 167 of the same work, he mentions “translate these intangible aspects into market value...” (Malloy 167). The term has also appeared in a number of other academic disciplines like psychology, gender studies and cultural studies, meaning more or less the same thing.

Moreover, as we have seen in my previous chapters, translation studies has seen a fair number of shifts in perspective that we call “turns” over its years of rapid development, each with its unique understanding of the nature of translation and explanation of why translators actually translate the way they do. Gary Becker claimed that the economic approach, being distinctive as it is, is capable of understanding human behavior in a variety of situations and contexts (Becker 3). In this respect, economics can create an opportunity of a new turn for translation studies in the sense that economics is a science good at explaining any phenomenon that involves human thinking and action, which usually features a highly predictable pattern, and it is precisely this predictable aspect of human beings as a collective that economics is based on (Friedman 2000: 9). There are very few aspects of human behaviour that cannot be approached quantitatively, and quantitative methods have always been an integral feature of economic analysis<sup>131</sup> (Dixon in Bartlett 186). On top of that, for the economist, who relies heavily on data, statistics and figures, “knowing what to measure and how to measure it makes a complicated world much less so” (Levitt and Dubner 2005: 14). Of course, again, this will ultimately tie back into the assumption that human beings are rational and self-interested, subject to the stimuli and constraints of the market, and that all interpersonal relationships—including ones that a

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<sup>131</sup> Of course, some of these different quantitative methods of economic analysis have evolved into new disciplines under the rubric of economics over the years, and these include econometrics and operations research (OR), but they all remain economic in nature nonetheless.



translation setting consists of—are subject to the simple and basic logic of supply and demand that governs all markets and market-like situations.

Sociologists (and advocates of the sociological turn) argue that examining the potential social implications of translation will help us identify the translator and the translation theorist as a constructing and constructed subject in society because a piece of translation is inevitably embedded within a particular social context where economics serves as a decisive factor (Wolf 2007: 1). Indeed, for better or for worse, translation is carried out by the translator who inevitably belongs to a social system, and the selection, production, distribution and capitalization of translation are all small fragments of the broader external social context, over which the translator has little control. Meanwhile, from another angle, economic parameters (such as supply and demand on a micro scale and economic development status of a culture on a macro scale) deserve some in-depth research on their impact on the broader translation phenomenon and on how translation shapes culture. This will eventually open up new perspectives on how translation occurs, operates and flourishes as an economic practice. All this should sound familiar to the ears of staunch believers of the sociological turn of translation studies such as Wolf and Toury. Thus, the sociological approach to translation and the economic approach, though different in methods and methodology, share a higher degree of resemblance than first thought.

As a quick sum-up for the moment, while sociologists position the translation phenomenon in a social/societal setting, economists would tend to treat translation as an economic activity with the translator as an economic creature who is essentially a rational and self-interested profit maximizer; after all, economics is a social science<sup>132</sup>—it is ultimately about human beings and how they organize themselves to meet their needs and enhance their well-being. Also, there might well be some subtle overlap between the two subjects; while the sociologist may treat economics and the greater economy along with all relevant and prevalent economic conditions as decisive social factors for their research, so too can economists view a particular social condition (such as a barter system or a close-knit clan)

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<sup>132</sup> Again, whether economics deserves to be called a science would always be a matter of debate. According to Joseph Schumpeter, the historian of economics, a science is “any kind of knowledge that has been the object of conscious efforts to improve it.” An equivalent definition would be “any field of knowledge that has developed specific techniques of fact-finding and of interference”. *Vide* Schumpeter, 1994, p. 7.

or social factor (such as race or gender) as a decisive variable in their argumentation. Something like this will not go as far as to invalidate their theories and propositions. Both camps have their own arguments that look equally valid and solid, but one thing is true for both: they are both blessed with their respective specific methodologies, they are both doing everything they can to understand, explain and possibly justify the translation phenomenon at large in the form of a turn, and, as such, they must not be considered mutually contradictory; they should, instead, coordinate and cooperate with each other.

Economics has a resilient methodology, and Thurston Dart, the well-known mathematician and musicologist of the 20<sup>th</sup> century who once applied operation research (OR)<sup>133</sup> to 19<sup>th</sup>-century orchestral music has more than proven this. More to the point, economic methodology should be in a similar position as sociological methodology in terms of its status in translation studies. Just substitute the terms *sociology/sociologist* with the words *economics/economist* in the paper by Michaela Wolf entitled *The Emergence of a Sociology of Translation*, and one will end up with something just as cohesive and persuasive. In her passage, the translator is repeatedly labelled a mediator/agent “socially constructed and constructing subjects” located within a social network trying to implement translation as a social event (Wolf in Wolf and Fukari 3). In the edited anthology *Constructing a Sociology of Translation* by the same translation theorist, Wolf, every contributor (from Yves Gambier to Johan Heilbron) seems to have made an unreserved effort to approach the translation phenomenon from the perspective of sociology by first viewing it as a social venue where all sorts of social factors come into play and then by considering the end product of translation a social thing/entity that either gets rejected or accepted by the society/audience that the translation is intended for—all within a larger social framework. In other words, every agent and player (translator, author, reader and publisher and the like) in the course of translation is treated as a social being with their unique roles to play within the broader context of society. Now, if we would just substitute all the society-related terms above with their counterparts in economics (eg., “translation could be an *economic* platform where all sorts of *economic* factors come into play, with every player/participant being

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<sup>133</sup> Some prefer to call it “operational research”. Either way, the acronym would be “OR”.

treated as an *economic* being...), then we could wind up with something decidedly different and yet so strikingly similar.

That said, however, while the term *economics* does appear a few times in Wolf's paper, it does so only as a concept of a lower order that just happens to fall under the rubric of a higher status within the hierarchy; in other words, for Wolf, economics is but a social factor no different than, say, age and gender. For instance, while arguing that translation seems to be shaped by culture and society (Ibid. 4), she states that the cultural level includes influential factors such as, among others, economics, which is in a parallel position with categories like power and religion (Ibid.), before moving on to social norms that are internalized by translators, as social agents, who then, in turn, act accordingly. She subsequently claims, and presumably accepts, that the dichotomy of society and culture would be adequate to describe the world of translation (Ibid.). Apparently, then, in her eyes, economic conditions (or the economy as a whole) seem to form a sector of the culture of the day; in other words, for her as well as for many sociologists, economics is probably nothing but a component of culture which is to be placed under the rubric of "culture". Moreover, seemingly economic categories were mentioned, and ideas from the French sociologist Pierre Bourdieu were cited a few times, such as field, symbolic capital, economic capital and *habitus*, just to name a few (Ibid.). More specifically, various participants in the translation enterprise were positioned head-to-head, including initiator, commissioner, source text producer (author), target text producer, end user and/or reader...etc. (Ibid. 10), all for the service to a sociology for translation. Apparently, for her and for a good many, economics, as an aspect of the broader social setting, should be subjected to functionalism<sup>134</sup> just like all other social/anthropological factors for any translation to make sense, and, as such, at the end of the day, all functionalist approaches have more to do with sociology than economics, with players and actors typically being referred to as "patrons" and "mediators of texts" (Ibid.). In this regard, if we enlist economics by substituting "sociology" (along with all its lexical derivatives) with

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<sup>134</sup> While I have no intention of going into too much detail about functionalism now, it is a school of thought that argues that no human institutions—language, economy, law and the polity—exist in isolation, and nor do they merely exist in people's minds; instead, they exist in the greater society that is made up of countless men and women, whose activities must, in turn, be observed and justified in the context of that society. Otherwise, there can be absolutely no concept or belief in the first place. *Vide* Asad in Baker, 2010, pp. 11 *et seq.*

“economics” and “patrons” with “firms”, we will likely end up with something that resonates just as loudly—and it is not just about the physical and syntactic form of the argument.

How so? As we can see, on the assumption that translation is a communicative act, the sociological turn attempts to approach and explain all social dimensions—culture being one of them—behind the translator’s selection of texts to work on for the sake of the intended *skopos*<sup>135</sup>. Hence, even if economics is rightfully downgraded by sociologists to nothing but another social dimension, along with culture and all, economics, as an area of research and a perspective, should still be given more weight in translation studies. All in all, as the famous economist Gary Becker asserted, what distinguishes one discipline (say, economics) from another (say, sociology) should be the approach and not (just) the subject matter, as there is often a high degree of overlap among disciplines, especially the social sciences, in terms of subject matter and scope (Becker 1976: 4). He also dismissed all scholarly effort that is centered on nothing but the definition of a field of research as “uninformative” (Ibid.).

As a brief yet firm rebuttal, it is my strong belief that economics is a “study of incentives”<sup>136</sup> (Levitt and Dubner 20) or a “study of human reasoning” (Friedman 1996: 3), and, as such, it should be given a fair shake—or a *fairer* shake—by translation theorists. At the same time, translators should understand that economists who have sought to fulfill the responsibility of principled economics to make better sense of the universe deserve people’s veneration. And why has this never been the case in translation studies scholarship? A very astounding and yet important reason has to do with the definition and the scope of economics as (mis)perceived by the lay public, which translators are a part of. More on this will follow later in this chapter.

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<sup>135</sup> Developed by Vermeer under the strong influence of functionalism in the 1980s, *Skopos* (which literally means “purpose” in Greek) theory, at the very basic, argues that translation should take into full account of the function, or the *skopos*, of the target text as intended by the target audience. Skopos theory, undoubtedly, invites heavy criticism from orthodox translation theorists who prefer strict equivalence. In a deeper sense, *skopos* theory makes heavy reference to true intention and physical action, and in this connection, pragmatics has had a great bearing on it.

<sup>136</sup> Frankly, the idea of economics as a study of incentives is not accepted by all. Michael Sandel, for one, implicitly laments the introduction of incentives into the resolution of all human problems, dismissing incentives as interventions that are “made up”, “dreamed up” and “acted upon” just for economists to be in an *ad hoc* position to resolve worldly (or otherworldly) issues. *Vide* Sandel, 2012, pp. 86-87.

Now, in the wake of the unique and sometimes eccentric nature of legal language and the peculiarities of legal translation because of it, I believe that economics would be capable of explaining the *modus operandi* of legal translators. And now, together we will embark on a journey into the world of economics.

### **B. Economics—A Brief Introduction**

Economics is undoubtedly an area of study that most people are (or think they are) familiar with, and for many of them, it automatically triggers a *prima facie* impression of money and wealth. While this is understandable, it does not capture the whole picture, for the economic approach is not restricted to material goods or wants, nor is it even confined to the market sector (Becker 6). Instead, it is a domain of human knowledge that deals with choices and decisions people make that will eventually lead to the (re-)allocation of resources when they are confronted with a wide range of options and alternatives, making economics a behavioural science through and through. Economics is, according to David Friedman, a way of understanding behaviour that starts from the assumption that individuals have objectives to achieve and tend to choose the “correct” way of achieving them, knowing very well that other people might be thinking the exact same thing too (Friedman 2000: 84). These were his original words:

Economics is that way of understanding behavior that starts from the assumption that individuals have objectives and tend to choose the correct way to achieve them.

(Friedman 1996: 3)

Conversely, according to Nobel laureate Gary Becker, the definition of economics in terms of material goods, which happens to be a familiar one, would probably be the least satisfactory one, whereas the definition of economics in terms of scarce means and competing ends would make the most general one (Becker 4). Just as there are many schools of thought on almost everything in every academic discipline, so too are there many schools of thought in economics, each with its own point of departure, theory and perspective. Whether economics qualifies as a science, once again, is open to debate, with

most economists, understandably, conferring. This is what economist Peter Schumpeter had to say about it:

Since economics uses techniques that are not in use among the general public, and since there are economists to cultivate them, economics is obviously a science within our meaning of the term.

(Schumpeter 7)

My position would be positive too. Moreover, one should bear in mind that to call a human endeavour a science is neither a compliment nor an insult; it should not spell either a compliment or the opposite (Schumpeter 6). It should be simply treated as a statement of fact, no different than calling something a craft or an art.

While capitalism considers a high degree of economic inequality as an inevitable result of a flourishing mercantile and commercialized society, with extreme market-oriented and laissez-faire economists considering such inequality—up to a certain degree—to be helpful insofar as it encourages productivity. As a result, capitalism has been accused of being an ideology advocating “labour of the many and wealth for the few” (Chattopadhyay in Musto 51).<sup>137</sup> Ideas become powerful when they woo and win the hearts of the masses, and despite the failure of socialism in some places across the globe in the past century, the ideas (or *ideals*) of socialism as a system of free individuality where everyone’s basic needs—both physical and spiritual—must get fulfilled with no one left behind still seem rather attractive for some. Mind you, by no means is Marxism against wealth *per se* or the accumulation of it; it is just against the high-degree of concentration of wealth amongst the superrich few, in which case capital would become an obstacle to human development (Ibid. 71).

Understandably, the Marxist view of economics and the Chicago school of economics<sup>138</sup>, each with its identifying and defining features, are as different—maybe even contradictory—as day and night. While the Chicago school as a neoclassical school of economic thought has been in the limelight in economics scholarship for decades thanks to its many adherents having become Nobel laureates every now and then, the Marxist school is, to my surprise, just as well and alive as ever. Marxism started off as a cure-all for the

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<sup>137</sup> Surprisingly, though, some historians of economic thought have recently noticed some writings by Adam Smith in which extreme economic inequality was considered not only undesirable but also outright dangerous. *Vide* Rasmussen, 2016, p. 342.

<sup>138</sup> This list is by no means exhaustive; there are many other views, Buddhist economics, which is strongly recommended by White, being one of them. *Vide* White, 1990, p. 73.

social havoc that ensued as a result of capitalism taken to the extreme in the 19<sup>th</sup> century, and, as such, the effects of it turned out overwhelming and long-lasting, with its shock waves spreading across and being felt as far away as Asia and Africa to this day. Even in the West, the conflict and competition between left-wing politics and right-wing politics have long dominated the news headlines in many places.<sup>139</sup> Admittedly, the political left in a country, if it exists at all, would seem to advocate ideologies like socialism and communism, but there is far more to the story than meets the eye. Political historians, especially Marxist ones, believe that the conditions for the rise of socialism are not given by nature; instead, it is more of a product (or *by-product*, depending on one's specific position) of the history of mankind. Economists lament the fact that the rise of economics as a science that has a Nobel prize created for it since 1968 has not been accompanied by any noticeable improvement in the ability of governments to manage their economic affairs (Greer 2); as a matter of fact, few countries or societies have ever benefited from their own economic experts in any real sense, much less any Nobel laureates, over the past few decades. At the same time, Western mainstream economics has been so aggressive and predatory on the environment and natural resources that economists are starting to look into the *failure* of (Western) economics (Greer 11). Paradoxically, though, Marxism might be able to come to the rescue at a time like this when corporate power is at its strongest thanks to corporations making obscene profits at the expense of social justice, and yet no hard-core Marxist economist has ever won the Nobel prize in economics—this definitely needs to change. Marx most certainly deserves to be given a “renewed” life by being reread today, and not just as an economist, but also as a philosopher and historian (Hoff in Musto 203). In fact, recently Marx has given academia some new life, though in a subtle way, and this time it is in the form of *post-Marxism*.

Despite an apparent lack of direct reference to the translation phenomenon, what the Marxist school of thought has to say about human nature is worth a mention in a context where human nature is approached and studied from an economist's perspective, and this is

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<sup>139</sup> Despite a lack of a firm and accepted consensus about the meanings of these terms, the left–right political spectrum is a system of classifying political stances, ideologies and parties, from equality on the left to social hierarchy on the right, with the left placing special emphasis on equality, progress and freedom and the right, on hierarchy, duty and order.

not just for the sake of pluralism. In fact, *The Communist Manifesto*, the first co-authored work by Marx and Engels, which was published in 1848 and had just a modest 23 pages in it, has been consecrated as the most influential single piece of writing by anyone since the *Declaration of the Rights of the Man and the Citizen* (*Déclaration des droits de l'homme et du citoyen de 1789*) of the French Revolution of 1789. It is no surprise that it has been venerated as a parallel to Adam Smith's *The Wealth of Nations* for economics literature. The first period in history when Marxism was resorted to by large masses of people was right after the start of the Long Depression of the 1870s, the unforgettable event that provided Marxism with the necessary fertile soil for overturning the bourgeois society of the time. There were many versions of the Manifesto, but the 1872 one formed the basis of all subsequent editions, and between 1871 and 1873, editions of the Manifesto swiftly appeared in a whopping six languages (Hobsbawm 6). Marx's influence rapidly picked up in the 1880s, when the Manifesto's fame spread over Europe and even beyond, with translations of it having appeared in some 30 languages (Ibid. 6-7). Marx's analyses, which sought to disprove the principles of capitalism by showing its deficiency, proved to be able to predict many historical events (Musto in Musto 2). This is indeed remarkable.

Whenever the name "Marx" or the term "Marxism" is mentioned, it immediately sparks a fiery image of the opening statement of the Communist Manifesto "Workers of the world, unite!" for people. True, enthusiasm for Marxism, thanks to its penchant for dialectical transformation, has fluctuated greatly over time due to the rise and fall of political regimes. For example, in the immediate years following the fall of the Berlin Wall, Marxism was, understandably, pronounced dead for a few years because of the seemingly anachronistic *mise-en-scène*, before being "resurrected" because of its ability to explain things that were left unexplainable because of people's neglect of it for nearly two decades (Ibid. 4), not to mention that there seems to be a peculiar convergence of views between the right and the left on what the term socialism means today (Chattopadhyay in Musto 36). To this day, perhaps owing to a totally different spatio-temporal entourage, as economists claim, Marx's *Das Kapital* is still a work of inspiration for research on the development of economic ideologies (Ibid. 7). Specifically, Marx is being cited in virtually every field in the



humanities and social sciences to this day, from gender studies<sup>140</sup> to criminology, with no sign of waning. Even Gary Becker, the neoclassical economist whom I highly revere and have heavily cited herein, had to make note of Marx in his work *The Economic Approach to Human Behavior*.<sup>141</sup> In short, Marxism, as a once revolutionary economic and sociological ideology, definitely still has immense implications for the human race in the 21<sup>st</sup> century, which is why I am including it here in my research despite the apparent anomaly in political stance rooted in anachronism.

In regard to human nature, Marx held out no promise of human perfection, and he never even promised to abolish all injustices altogether. Instead, the promise that Marxism does hold out is to resolve the contradictions that currently prevent history from advancing, in all its freedom and diversity (Eagleton 91). While he kept stressing that the path towards communism would be as inevitable as the writing on the wall due to some historical determinism, he did confess that a power struggle that led to some bloodshed would also be unavoidable (Ibid. 46). Basically, as regards human nature, both “law” and “morality” are typically sections of the ideological superstructure in the Marxian theory of historical transformation. German Marxist philosopher Iring Fetscher said in his paper that Marx was concerned with the conditions for the transformation of capitalist society, and, thus, all his writings on human nature were based on the assumption that human beings are a type of animal trying to distance itself from other fellow animals (Fetscher 444). Being a product of nature, human beings are creatures of shortcomings and deficiencies, but it is precisely this quality that underlines their superiority over animals of natural history. Human beings are produced by themselves (and not by God either as Marx was reportedly an atheist), whereas animals are produced by nature. For Marx, there exists a very close link between our reasoning and our physical life; there is no split between the two in the human body (Eagleton 136). This is interesting and relevant because economics is—again—ultimately about human nature, and I think that what Marxism thinks of human beings is worthy of a mention.

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<sup>140</sup> For example, Karl Marx is cited in *In a Queer Country* as an inspiration for the gay rights social movement in Canada, in which individuals advocate a revolution against the state. *Vide* Kinsman in Goldie, 2001, p. 227.

<sup>141</sup> *Vide* Gary Becker, 1976, p. 9.

To begin with, Marx's dialectical view of the becoming of man through history serves as a felicitous backdrop for the subsequent unfolding of his discourse on human nature (Fetscher 457). Man, who is gregarious in nature, cannot live in isolation; in one word, man is a social being, and this seems to coincide with the mainstream Western position. A human being can only develop specific and individual qualities with the help of other men. Without language and survival skills, he cannot survive because he would lack consciousness (Fetscher 448). Under Marxism, as we can see, human beings are, congenially speaking, animals, and they need their incessant labor to distance themselves from their primitive “animal functions” (Szybel 170). Indeed, there is good evidence indicating that Marx believed that humans are animals that share some “common ground” with other animals, a fairly naturalistic perspective, although “naturalism” is yet another term that is controversial and ambiguous. One complication of this position is that if human beings are animals, then they are not subject to the will of divinity, leaving them responsible for their own fate (Ibid. 171). Speaking of divinity, in passing, Marxism has always been likened to atheism—and with good reason. The Marxist wholesale dismissal of religion was supposed to be a social experiment at first—however doomed or failed it turned out to be, but according to religious freedom expert Marci Hamilton, Marx indisputably made a good point announcing that “religion is too often an excuse for sloppy thinking and delusional optimism”, thereby denouncing all extremist actions carried out in the name of religion—actions that will do nothing but “undermine culture altogether” (Hamilton 302). Of course, while Marx spared no efforts in condemning capitalists of subjecting workers to sub-human and even non-human working conditions, he did acknowledge that human beings share at least some animal functions, stopping short of outright claiming that this is all there is going for human beings (Szybel 172). One vital core of Marxism is that human needs should not go unfulfilled, and this applies to every living human being. Under this principle, even if one lacks the ability to produce, one's needs are still to be satisfied (Ibid.). For Marx, apparently, rights are always egoistic, and they go decidedly against the idea of a world that welcomes “from each according to his abilities, and to each according to his needs”. Going even further with this line of thought on human nature, it is wrong and groundless to assume that every human being in every action acts with purpose and plan (Fetscher 446); for Marx, unlike for Adam Smith, people

do sometimes engage in actions and activities out of the blue without a visible purpose in mind at all—much less their own purpose.

As regards personal interest versus collective interest, Marx appears to be a consequentialist welfare economist, especially in regard to moral questions. For him, the right thing to do is whatever would maximize the well-being of the vast majority of everyone involved, which in turn indicates that for him, equity and efficiency are not always two contradictory values. This, of course, could sound astonishing to some. Marx argued that if the character of man is rooted in conscious work, then language and consciousness have to be there, and these can only exist in society (Fetscher 447). In his early writings, Marx seemed to prefer to connect this argument with the necessity of both man and woman in the act of procreation: for natural as well as for human existence, more than one person is necessary, and thus man is from the very beginning a "social animal". Human beings can only develop individual qualities for survival—in nature—with the help of members of his society (Ibid. 448). Again, man, in one word, is gregarious. While the predictions by the Second International that socialism would flourish and take root sometime in the 20<sup>th</sup> century never came to fruition, its implications led to the advent of social democracies (notably in Scandinavia) around the globe, which were partially backed up by Keynesian ideas (Newman 117-118).

To put all that in perspective for translation, the legal translator may sometimes work without a clear purpose in mind, and while this evokes the philosophical question "Is there always a purpose for everything?", it does receive some concordance and resonance from the Marxist view. Tymoczko argues in her paper *Translation: Ethics, Ideology, Action* that people in academia have come to explore translation as a means of fighting censorship, coercion, repression, and political dominance (Tymoczko 443). "Why is that?", one might want to ask, especially those who associate anti-censorship with liberalism. According to Tymoczko, if translation is seen as an ethical, political, and ideological activity instead of a mechanical linguistic exercise, then the ideological implications of literary creativity and innovation will not be hard to imagine (Ibid.). This view is indeed revolutionary.

Furthermore, as a form of grassroots activism maybe, given the grim and brutal impression of Marxism amongst the general public in the West, ever since the breakup of the Eastern Bloc and the Soviet Union, there has been an attempt to revitalize Marx's theory with a

view to re-establishing a previous “bond” between the ruling class and the working class through a new and innovative intellectual movement (Sim 4). Hence the new scientific perspective named *post-Marxism*.<sup>142</sup> In any case, what this means for us academics is that Marxism should be accepted or rejected on its own merits and demerits—and solely on them. True, Marxism has declared huge success in areas such as political science, sociology, aesthetics and economics, but this serves as no pretext for any oppressive and anti-democratic measures conducted by an authoritarian political regime. Any critique thereof should be liberated from the legacy of notorious interpretation of classical Marxism—ideas such as totalitarianism, authoritarianism and Stalinism—and allowed to compete with all other ideologies (Sim 164). Marxism is more than superficial sophistry, and people, especially intellectuals, ought to view it with an open mind. Apt examples to this effect are many, and ignorance will only beget more ignorance. I guess that only in this way can translation studies advance to the next level—with prestige and honor.

Here and now, I would like to make a brief summary of the economic school of thought of Marxism, as opposed to the Chicago School, and what it means for legal translation.

According to Tymoczko, who has published on the power relations of translation extensively, the diminished confidence across the intelligentsia in the Marxist approach is undoubtedly a shame for everyone. For her, the trajectories developed in translation studies scholarship and other fields indicate that new theories of power are needed, as are new theories of resistance and activism—theories that will be more flexible and more applicable to a broader range of cultural contexts than postcolonial theory can be (Tymoczko 2006: 457). It will certainly be a shame if all this is ignored. Legal translation, as we know it, involves knowledge of at least two legal systems/legal traditions and familiarity in at least two legal cultures, on top of the universal requirement of bilingual proficiency. Thus, it goes without saying that legal translation is a platform, or even a minefield, of power relations; it is never a level field for all players, as there is simply too many players, actors and power relations involved amongst all of them. Meanwhile, Marxism, or more accurately, followers of Marx, have poised themselves at the forefront of anti-nationalist

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<sup>142</sup> If history is any guide, in the intellectual arena, there have been many schools of thought with ground-breaking narratives such as post-modernism, post-colonialism and post-structuralism...just to name a few, each of which reflecting its unique background within a unique cultural climate. Voilà, welcome to the “post” world!

movements. Nationalism, one of the key purveyors of language policy and multilingualism, is still very alive and powerful, and it has demonstrated time and again its potential to recruit intellectual support (Edwards 133). Socioeconomic factors can have an impact on language spread and decline, and economics can be a major influence on culture (Ibid. 117). Human beings distinguish themselves from animals via the performance of labour, which is essentially a means of transformation of nature and social cooperation (Fetscher 454), and since labour is the source of wealth, legal translation, as a form of intensive and demanding labour, is rightfully in a good position to transform and create wealth for all parties concerned.

In his well-known work *The Philosophy of Money*, German philosopher Georg Simmel first offered an apology for a money-based economy before outlining a theory based on the process of objectification, and he is one of the critics of Marxism (Simmel 22). Simmel saw money as a structuring agent that helps people understand life in its entirety, presumably postulating an anti-Marxist view. One place where Marxism seems to differ considerably from the Chicago School is on the parameter of value. While the neoclassical view, which strongly believes in the objectiveness of money (or currency), claims that everything can and should be broken down and then expressed in money terms, Marxism claims that value should be expressed in terms of labour. For Marx, all value is labour. This is a very important feature that defines socialism, for socialism strives for a construction of society that values the utility value of objects in relation to the labour time invested in their production (Simmel 462). Indeed, Marx argues in *Das Kapital* that the precondition of all value is use value (i.e., a value as demonstrated through the use of the object or service at issue). This theory, if taken at face value, would probably mean that a legal translation target text must be evaluated either for its intended use by its intended audience (the end-product consumer or the refugee-asylum seeker in need of community interpreting), or, alternatively, it could be evaluated for the labour invested in it (as all labour is value), but not necessarily evaluated by the going market value, or the *exchange* value, which might get skewed or even distorted by supply and demand, which in turn would be subject to the willingness to pay of all players (buyers and sellers alike). This, apparently, would be an conclusional deduction by materialist philosophers like Marx. In this sense, then, the

Marxist economic view seems to be in a good position to distribute translation resources in the best way.

Before I conclude this section on Marx and the Marxist view, I would like to reiterate what Gary Becker says in his work about his (quick) views of Marxism and how it differs from his own proposition. While he first praises Marxism for its application of economics to all sorts of non-market behavior such as marriage, at the same time, he also alleges that the Marxist economic approach means that the “organization of production is decisive in determining social and political stature” on the assumption that general subjugation of one class by another was the norm in a capitalist society (Becker 9). Much as I fully understand his need to distance himself from Marx, here I must point out that what he considered *economic* of Marx was not really “economic”; the correct terms should probably be *materialistic* and *materialism*<sup>143</sup>.

Since Jeremy Bentham, the renowned British moral philosopher of the 19<sup>th</sup> century, founded the doctrine of utilitarianism, his teaching of the maximization of the overall balance of pleasure over pain, or “pain minus gains”, seems to have won broad acceptance. Interestingly, this teaching of his might have incidentally laid the foundation for cost-and-benefit analysis as it is known today. Regardless of one’s personal evaluation of his position, it should be, at a minimum, obvious that once past a certain level, economics is not just about money, and all economics projects that were awarded the Nobel Prize had little to do with money *per se*.

Admittedly, once again, by *economics*, I am mostly referring to the position and approach of the Chicago School, the neo-classical perspective on microeconomics—and this for personal practical reasons.<sup>144</sup> This branch and school of economics, which is by and large focused on a market economy and an exchange economy<sup>145</sup>, is important and powerful because it makes a model out of all human activities imaginable, and, as such, it has earned

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<sup>143</sup> Materialism, as a tenet, is positioned in stark contrast to idealism or spiritualism.

<sup>144</sup> *Nota bene*: For pragmatic reasons presented previously, aside from a few tangential references to it scattered around, Marxism will now be largely neglected from this point on. However, this in no way indicates my personal stance for it.

<sup>145</sup> Admittedly, a market and all relevant figures that are based on exchange value does come with their fair share of criticism—and not totally without cause. A gross domestic product (GDP) that excludes anything transacted or conducted outside the exchange market, such as voluntary work and private investment into human capital, will never get recorded—which has been common practice in mainstream economics—has come under sharp attack from many economists and non-economists.

itself great reputation from been applied and introduced into so many modes of thinking worldwide.<sup>146</sup> In regard to the history of law and economics, the Chicago School roughly began with Ronald Coase's paper *The Problems of Social Cost* and culminated with Richard Posner's work *Economic Analysis of Law*, but this does not mean that the Chicago School has never encountered any criticism or challenge—especially in the context of morals and social norms (Harrison 3). By the way, the paradigm employed by the Chicago School most often is termed “Resource Allocation Paradigm”, or RAP for short, by some in light of its concentration on the efficient allocation of scarce resources (Reder 43). Becker recommended this school of thought for its ability to “integrate a wide range of human behavior” and for its “assumption of maximizing behavior” (Becker 5). More specifically, this influential school of economic thought, which, on the assumption that every human being is rational, selfish and in possession of identifiable and stable preferences, maintains that everything evolves in ways that promote efficiency, and ultimately, equilibrium. The optimal status of resource allocation in the marketplace is of special interest to me because it was precisely the school of thought in which the law and economics movement originated. Today even law and language scholar Pierre Legrand, who has been cited a few times herein, considers the initiative of recasting law in terms of economic indicators “unassailably productive” (Legrand in Glanert 208)—though not without some reservation and concern presented later on in his paper. Interestingly, this prestige that economics has earned itself has helped establish a school of thought called *economic imperialism*<sup>147</sup> or the *imperialism of economics*<sup>148</sup>, which refers to the overwhelmingly intrusive application of the economic approach to what traditionally used to stay beyond the reach of economics—much to the dismay of some non-economists (Friedman 1996: 209). Gary Becker says in his work *The Economic Approach to Human Behavior* that all human behaviour “can be

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<sup>146</sup> In all fairness, this argument is far from universal, and it has encountered disputes coming from both within economics circles and beyond, with some disputing the potential implications of its assumptions and others doubting its “fundamental assumptions” (such as values can be expressed in dollar/euro terms, whether traders are truly wealth-maximizing...) to begin with.

<sup>147</sup> Of course, the term *economic imperialism* may have a different shade of meaning, however derogative and degrading, and that is its reference to the exploitation of poor and less developed countries by powerful and rich ones, which is nothing but a weaker version of military imperialism. Of course, this aspect of the term is, in the main, irrelevant to my research.

<sup>148</sup> James White prefers this term in his book *Justice as Translation*, and it refers to, in his own terms, the conversion of theory into ideology in a literary manner the recognition that everything can be expressed in economic terms. *Vide* White, 1990, p. 77.

explained and predicted as a rational calculus of costs and benefits” (Becker 1976: 8). The blunt truth is, whether we like it or not, this novel idea has caused considerable commotion among many throughout academia, receiving both criticism and applaud.<sup>149</sup> Economic imperialism has become so extensive that some economists are claiming that the impact of it on the general culture may be way greater than on any of any other social science (Reder 359)—and they may well be right. As a prologue to my argument on ethics that we will encounter shortly, it is precisely because of this great potential impact that economics may have on people from all walks of life, along with the potential of economics (typically in the form of carefully embellished statistics) being distorted by mealy-mouthed politicians, that a professional economic ethics is urgently needed (DeMartino 4).

Before we carry on with our endeavour with economics, there are some standard assumptions of economic analysis that must be made and adhered to in analyzing the efficiency of all human institutions (this presumably includes legal norms and translation). First of all, all benefits and costs can be measured in terms of a common denominator—money, arguably for the sake of objectivity and simplicity (Polinsky 10). Second of all, assuming that individuals know what is best for themselves, they get to determine the dollar (or euro or yen or...) value they want to assign to their costs and benefits (Ibid). Thirdly, people’s preferences are not typically affected by changes in public policy (Ibid. at 11), and, finally, there is the assumption of utility or profit maximization (Ibid). Apparently, these assumptions, while basic and straightforward, do not appear “innocuous” at all to some people, and this could even turn into a source of controversy in an economic framework, as we will find out later. This is arguably one of the things that led some to consider economists as ideologues in disguise rather than true scientists, which, in turn, urged economists to constantly redefine the scope, methodology and contents of their field of research (Reder: cover flap).

Economics, or at least the neo-classical economics as advocated by the Chicago School, describes—quite accurately and comically—human nature and human reasoning. Again, contrary to common belief, economics is by no means (just) a science of or about money

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<sup>149</sup> It is no secret that capitalism is dismissed by some for being too exploitative an economic system in that it subordinates everything to the interests of an extremely small corporate and financial elite, not to mention that the prescriptions of economists sometimes do get distorted in the political arena.



and wealth; instead, it is about—particularly the microeconomics branch of it—a set of models that help to explain the process by which scarce resources are allocated among alternatives (Gravelle and Rees: 1). Thus, at its core, its subject matter is the individual’s rational choice (Friedman 2000: 8), typically coupled with time constraints and affordability constraints (Becker 1993: 386). Economic methodology and economic models will, of course, always be a reduction or a replica (depending on one’s perspective) of real-life situations and never an entirely accurate and complete representation of the real world. Nevertheless, such models are particularly useful for making predictions, leading some economists to label economics as the “dismal science”<sup>150</sup> whose primal aim is “explaining how people get what they want” (Levitt and Dubner: xi). Indeed, instead of burying their heads in the sand, economists are well aware of the imperfect nature of their models, upon which their theories are based, and instead of discounting the validity of their theories, they consider it enjoyable to be left in a position where one gets to choose among a array of options, whose merits and demerits must be made crystal-clear to the decision maker (Friedman 2000: 315).

Since the most central underpinning that is part and parcel of economics is not money but reason, human action/human behaviour has to be studied and evaluated on the basis of a few assumptions, including, *inter alia*, rationality, self-interestedness, the scarcity of vital resources, value determined via exchange, rational profit maximization and attitude toward risk. In real terms, what this means is that, as *homo economicus*, human beings are rational in the sense that they know the action/reaction that is most likely to help them achieve their ends (objectives). Rationality is, in plain words, all about making the right decision about what to do or about how to decide what to do about something (Friedman 1996: 7). To put that in a layperson’s perspective, the most visible and manifest “phenomenon” to the naked eye (like signing up for a mobile phone or filing for a divorce) is simply the end result of this prolonged operation of “mental gymnastics” that involves all sorts of calculations and planning, not to mention some tactful finesse. Also, by the way, as regards rationality, at the same time, there would be some incompatibility between individual rationality and group rationality, and, while I do not intend to spend too much time and space on the

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<sup>150</sup> This is a far cry from what Susan Doyle proposed: economics as the *soulful* science. More on this will follow shortly in this thesis.

philosophies of reductionism and holism, the plain truth is that parts do not always add up to the same “whole”. This is humorously referred to as the “dark side of rationality” by Friedman (Ibid.).<sup>151</sup> As a quick example, it might be wise for all stores in a neighbourhood to team up selling a fixed amount of something and charge consumers an exorbitant price, but it might be wiser for any single store to cheat on the team with a lower price and with a greater quantity; yet, if everybody finds out about the cheat and feels forced to follow suit, then the team will collapse and everyone will be end up back to point GO. As a quick sum-up, what this means for the translator is that what is seemingly good for the individual translator might not always be good for the entire translation industry, much less for all of humanity—which reminds us of the public goods problem.

Then comes the inherently self-interested nature of the human race. While it is true that human beings are rational, they are also self-interested—often to the point of deceit—in the sense that whatever they do, they are doing it for themselves—even when what they are engaging in is something purportedly altruistic—whether they want to admit it or not. The underlying assumption of the selfish nature of human beings is that the pursuit of self-interest promotes public interest (Malloy 17). British economist Adam Smith put forward a similar claim but in a rather elusive way. In his work *The Theory of Moral Sentiments*, Smith argued close to the beginning that no matter how selfish a person may be, he will always feel some misery or joy for what other people experience (Smith 1759: 1). My personal interpretation of Adam’s remark is that no matter what we feel about what we encounter, we are feeling it as if it were happening to us; in other words, we are feeling it *for ourselves*. Against this background, no manifestly observable phenomena (like getting in line to order food at a restaurant or even Mother Teresa’s charity for the sick and poor) should be taken for granted as a fact of nature; instead, they all simply reflect a lengthy process initiated by rational and self-interested individuals reacting and adjusting themselves to a set of constraints in accordance to their own wants and needs (Friedman 1996: 18). This aspect of self-interest, or just “interest”, for that matter, would probably

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<sup>151</sup> While this might not appear obvious at this moment, to quote an easy-to-understand case in point from Friedman, if one soldier in a troop escapes, he would be better off; if everyone else also escapes, he should definitely also escape too. Therefore, in any case, regardless of what he thinks his colleagues might do, he should run off. Everyone thinks so, does the same thing and ends up getting killed. A counterintuitive result like this one is a typical—and by no means completely hypothetical—example reflecting the so-called “dark side” of rationality.

deviate considerably from what people are used to. While the term *interest* might suggest something negative when coupled with the word *self*, it is actually something of a much more noble nature. Essentially, the concept of *self-interest* simply reflects the wish to influence a socio-legal discourse (Malloy 65). As a matter of fact, people engage in attempts to influence other people's positions and opinions more than they actually realize, and it is this intention of controlling things that is featured in the self-interestedness of people and that is hard to express in mathematical terms. This authority could be very important for some, as it grants them the opportunity to control and shape the decision process that would otherwise fall beyond their control (Malloy 66). Finally, there is the idea of profit/utility maximization, which is presumably the material embodiment of the two human qualities of self-interestedness and rationality. At the most basic level, it simply concerns utility for the household and profits for the business firm based upon stable preferences, but more specifically, maximization is effectuated by the actor/agent choosing the quantities of all goods consumed such that their marginal utilities equal the prices they pay, and if there is risk involved, inasmuch as the risk is predictable and quantifiable, maximization then would be for expected utility. But is it really that simple? Do human beings really feature a built-in utility formula/calculus that accounts for all their preferences and wishes which ones will, at the same time, help them maximize what they get from what they invest? Economists seem to think so, and the assumption of stable preferences "prevents the analyst from succumbing to the temptation of simply postulating the required shift in preferences to 'explain' contradictions to his predictions" (Becker 5).<sup>152</sup>

Without a doubt, the two key assumptions of human nature rely heavily on an unwavering faith in the mechanisms of a free market and intense competition as competent solutions to worldly "vices" and "ills", which, in turn, necessitates constant stress on individual liberty and reduction of state intervention (Haines 1997: 32). Since there are many devices and mechanisms that may potentially induce rational behavior (such as evolution, basic instinct accompanied with trial and error etc...) that purportedly involve little human reasoning, the complex process that presumably consists of subtractions and additions is not always

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<sup>152</sup> This is somewhat controversial actually. Becker, by his own admission, acknowledges that people's preferences are assumed to hold steady (at least for most of the time) over time simply because economists have little say on how preferences are formed and adhered to. *Vide* Becker, p. 5.

transparent, but it is exactly what goes on in a person's mind when he is trying to make a decision (of course, miscalculations are always a possibility); it is basically hardwired into his brain. Furthermore, while there may be some occasional "irrational" behaviour in an individual here and there, with a sample and a population of considerable size, all occasional irrationalities and irregularities will get evened out. As long as we accept the position that if and when a person is sure that doing something will most likely make themselves better off, then there will be a very good chance of them wanting to go through with it, then we can consider ourselves agreed on the rational and self-interested aspect of human nature. This is precisely the most fundamental assumption on which economic theory is built. It is precisely because of this predictable element in human behaviour that, by Friedman's own account, the assumption of rationality in human beings, while not impeccable, is probably the best assumption that comes with any degree of reliability (Friedman 2000: 11). In this regard, Diane Coyle seconds Friedman's position, arguing that rational choice and the use of equilibrium for all relevant variables and values for building models will always remain two key elements of economic methodology, both of which will always be core and fundamental to the economist's mode of thinking, despite occasional counterexamples to them (Coyle 2010: 266).

As we move from the basics towards the core, the two key terms need to be dealt with in a more down-to-earth way. How are we to treat terms like *self-interested* and *rational* that are considered central and abstract? Will quantifying them ever be enough? And with these assumptions, can economics be a truly value-free science? Apparently, not for James Boyd White, as he thinks that these are probably best treated as "analytic facts"<sup>153</sup>, and also as umbrella terms that are to capture all values that people contribute to their exchanges with others. This school of thought is even referred to by White as a renewed system of value (emphasis mine) whose advocates are, in making their claims, actually trying to establish new values (White 1990: 56 *et seq.*). In other words, those economists who claim that their theories or propositions are value-free are actually setting up yet another system or category that is *in se* a value system.

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<sup>153</sup> By the term "analytic fact", James White is presumably referring to a "hypothetical" and "tautologous" and very relevant fact that there has been a transaction going on between the parties concerned, whether or not money or anything material was involved, and whether or not the parties themselves were even aware of it.

Whether economics is value-free or not, incentives lie at the root of human behaviour, and economists are often quick to take advantage of them to explain many things. Essentially, an incentive is inherently a trade-off that urges people to do more good things and fewer bad ones (Levitt and Dubner 23). They could be either negative (like a fine for coming in late) or positive (like funding for students with straight A's) (Ibid. 20), and they can take one of these three forms: economic, social and moral, adding up to a total of six distinct forms (Ibid. 21). By now, one should be able to tell that incentives are rarely spontaneous; the powers that be usually need to know how to design them, invent them and introduce them, and, for better or for worse, those that are affected usually have no choice but to give in to them. While I am not ready to accept the view of hard-line determinists that human beings are never free, yet, to be frank, human beings are (mis-)calculating creatures who often think they can outsmart the system only to be influenced by incentives that were designed to “fool” them in the first place.

Then comes the contrast between consumer sovereignty and producer dominance, which ultimately boils down to choice and all its surrounding contexts. Is it the case that consumers get to choose from a range of product/service options made available to them, or is it that they are simply forced to choose from whatever producers provide them with, having been brainwashed by producers into buying it? For sure, there is no easy answer to this question, and it resembles the “Chicken or the Egg?” dilemma that underpins circular reasoning. Choice theory advises people to satisfice instead of maximize when facing an overwhelming amount of choices, and the philosophy of determinism seems to suggest that since consumers do not really have a choice in anything, they might as well just select whatever requires the least time and efforts without bothering to attempt to “tip the balance in their favor”.

Of course, there will always be (at least) two sides to the same story, and an economic discourse is no exception. Granted, a person's personality trait can determine his behaviour, and along with incentives invented on the part of the policy maker comes cheating, an activity through which the fraudster tries to get more for less, and one that has accompanied humanity since the dawn of time. In a way, though, the possibility of cheating is just a reminder for the policy and decision maker that they should never take things to the

extreme, however well-intended their incentives may be. While fraud and deception should never be tolerated, its presence does prove the selfish side of human nature, which, in turn, will establish the *raison d'être* of an economic analysis of all human behaviour. And we thought economics was about nothing but money!

### **C. Economics—A Powerful Methodology**

Consisting of a wealth of geometrical models and paradigms, economics, for its part, is a diverse discipline with miscellaneous ramifications. Economists typically think of their field as a successful social (or even natural) science with a powerful and scientifically watertight methodology backed up with rigorous mathematical models and expressions. While Eduardo Porter has a book with a self-descriptive title: *The Price of Everything*, in which he listed ideas such as *The Price of Things*, *The Price of Happiness* and *The Price of Faith* as chapter titles (Porter: Table of Contents), David Friedman is particularly outspoken about the scope of his subject, never missing out on any opportunity to remind everyone that economics is “neither a set of questions nor a set of answers”; instead, it is an “approach to understanding behaviour” (Friedman 2000: 317). Whatever the individual economist’s stance, one thing is for sure: economics is capable of explaining and predicting human behaviour—especially well thought-out behaviour, and it is good at it thanks to its use of rigorous and non-trivial mathematical and statistical formulae and models. Becker argued that the economic approach is powerful simply because it can integrate a wide range of human behavior (Becker 5). Prices, actual or shadow, urge human beings to take one course of action or another, and every final decision amounts to a choice among several options to which different values are assigned. And because of Becker’s contribution to the expansion of the economic approach into the non-market domain maybe, today, few areas of law are beyond the reach of economics (Posner 61). It has been found to be able to explain many categories that are traditionally outside the ordinary province of economics—like the music industry, as well as some that are even more “exotic”—like sexual orientation, as demonstrated by Posner in his paper *The Economic Approach to Homosexuality*, in which he argues how the gap between sexual preference and sexual behaviour is affected by social construction, all of which ultimately boils down to a well

thought-out economic calculation.<sup>154</sup> Economists with training in more than one field who are willing to expand their horizons and share their findings by multitasking have gone out of their way to investigate the economic circumstances governing many a profession, be it as an attorney or a musician (Peacock 2). As a matter of fact, Peacock, as an economist, has a whole chapter dedicated to the application of economics to music in his work *Paying the Piper*; it is entitled *Intermezzo (1): Economics of Musical Composition in One Lesson*, in which he calls himself an “economist who dabbles in musical composition”. He even adds that no one would be a good economist if he is nothing more than an economist, showing how flexible and universal (and quite possibly tedious too) economics can be (Peacock 36). And that with good reason—the tools of microeconomics are viewed as a unified approach that is capable of dealing with the cascade of problems arising from social interaction, and this is indeed admired—and even desperately needed—by some disciplines. At the same time, macroeconomics, the other predominant branch of economics, is, by definition, the study of the “big picture” or the “bigger picture” that determines the aggregate figures in the economy (Ray in Bartlett 111), where the government or the state is usually treated as a participant. One cannot claim to be a believer and advocate of economic methodology without a full understanding of both branches.<sup>155</sup>

In any case, however cynical this may sound, it is widely accepted that while ethics represents the way that people would like the world to work (perhaps in Utopia), economics is the enterprise that explains how it actually does (or does not) work (Levitt and Dubner:13). Economics is, in this sense, a science of measurement that can process information head-on persuasively (Ibid.). In any real-life situation that requires immediate attention, once a course of action is opted for on normative grounds, economics can be resorted to for the most cost-effective method for achieving one’s goal (Malloy 61). This is probably why cultural economics, a field of economic inquiry that barely existed prior to 1992, did not receive professional recognition as a category of economic inquiry until it was granted status as an economic discipline in that year (Peacock 2). However belated this might have been, it does show that economics can serve as a powerful tool in explaining

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<sup>154</sup> Posner, Richard A., “The Economic Approach to Homosexuality”, collected in David M. Estlund and Martha C. Nussbaum (eds.), *Sex, Preference, and Family*, Oxford: Oxford University Press, 1997, pp. 173-191.

<sup>155</sup> Admittedly, the capability of predicting behaviour is different between the two branches, but this would be mostly irrelevant in regard to how economics is to be applied to translation studies.

human behaviour and extrinsic phenomena, and this does not just include music and the various activities of musicians. As a matter of fact, economics has been incorporated into the research of scholars from many disciplines without anyone realizing it. Cameron and Simeon argue that the successful accommodation of language depends on how leaders and activists weigh the costs and benefits of further cooperation; and a society, even if it is one that is divided along a language line, can still function and even prosper as long as the benefits of accommodating the needs of all language groups clearly outweigh the costs (Cameron and Simeon 15). They, ironically, went on to confess that a bilingualism policy and the linguistic accommodation that comes with it entail unavoidable costs, which are partly financial and partly psychological and personal, and which may or may not be evenly distributed (Ibid. 16). In any case, I think that what they are suggesting is that a cost *per se* should not be categorically viewed as a hindrance; it can be a sign of a benefit, which might well turn out greater than the cost in the long run.

In the mind of the economist, their discipline is supposed to be neutral and value-free<sup>156</sup>, and all motives, interests and purposes on the part of any actors/players are considered self-serving, quantifiable and rational (or well thought-out). This served as one of the main foundations for economists' self-claim as "social engineers", and yet, at the same time, economists often view their work as the direct application of objective principles in total denial of value judgments that an economic intervention like social engineering will entail (DeMartino 5). It is on this premise that constructing a model out of a real-life situation—be it verbally or graphically—is possible at all, which will, in turn, distill the essence of whatever is under scrutiny (Polinsky 2003: xv). As one might have noticed by now, *ceteris paribus* assumptions (self-interest, rationality, profit maximization...) are constantly being made by economists in the course of their research because the material world would otherwise be hard to break down and understand without some abstraction of reality. Also, just as translation can be studied descriptively or prescriptively, so too can economics when it is being applied to a particular subject or phenomenon. When economics is being used to describe things/phenomena as they are, it would be a positive (or descriptive) approach, whereas it would be a prescriptive (or normative) approach when it is being employed as a

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<sup>156</sup> Whether economics is truly value-free is open to debate. James White, for one, is highly skeptical of this claim. Perhaps "amoral" would be a better choice of adjective for scholars like him.



tool for generating and proposing changes that might bring a change to those phenomena, such as improving them in terms of economic efficiency, for that matter (Ibid., xvii).

On the other hand, economics is referred to—maybe even consecrated—as the “soulful science” by some economists, and with good reason. In her book *The Soulful Science*, in response to the public impression of economics as a “dismal” science, the author Susan Doyle describes the remarkable creative renaissance in economics since the days of Adam Smith’s *The Wealth of Nations*, and how economic thinking is being applied to the paradoxes of everyday life for the resolution thereof. For her, economics is definitely “entering a new golden age” (Doyle 1). Indeed, economists, by their own admission, tend to speak as if they had the *only* sensible understanding of economic affairs and also, in response, the only optimal solution to them (DeMartino 7). While this may sound rather self-conceited, it is understandable. Of course, while professionals are assumed to “know best”, this, in turn, will require a higher standard of ethics that not only prohibits willful wrongdoing but also encourages economists to utilize their expertise in a way that would enhance overall human wellbeing. This is especially important when economists are engaging in activities that may have an impact on the lives of others ranging from something as innocent as teaching a college course to something as political as making economic policy recommendations to the administration as a think tank (Ibid. 13).

Perhaps as a compromise between these two almost mutually contradictory positions, Becker stressed in his work that the most key and predominant task of economics is to provide a framework for the understanding of all human behavior, and in no way does this suggest that economics needs no important concepts and techniques provided by other disciplines (Becker 14); if anything, quite the opposite, as a matter of fact. He concluded by letting his disciples and descendants judge for themselves how powerful the economic approach would turn out (Ibid.).

Inasmuch as economic methodology is applied, accepted and venerated, perhaps no other interdiscipline has been so successful as law and economics, which is typically hailed as a shining example to this day. While it all started out as a law and economics movement, it has, according to Richard Posner, become “the foremost interdisciplinary field of legal studies” (Posner 2001: 31). This might well be an exaggeration, but the glory and glamour

as a result of this movement has certainly turned a new page for both jurists and economists. How was this made possible? I think that this is one of the many things we need to find out if we are to attempt to apply economics to translation studies. In short, jurists had long had the virtue to acknowledge that legal theory should not be a single research program, while, at the same time, they detected the heuristic, descriptive and normative aspects to economics and learned to appreciate them and then, one thing after another, they formulated the economic analysis of law (Ibid. 4). Further, as Malloy claims, regardless of one's politics, the borrowing of market concepts has "transformed legal reasoning and captured an authoritative position in the legal imagination" (Malloy 3). This is very remarkable.

One important parameter often encountered in economics is value, and it is on value that many tenets of economics are based. Arguably, it is also value that can transcend all social sciences. More specifically, value is tied to choice, and vice versa. Also, value is observed in choice, and "action speaks louder than words" (Friedman 1996: 14). Specifically, in this context, it refers to "economic values", which simply refers to the "value as judged by them and revealed in their actions" (Ibid. 17). Furthermore, according to Friedman at least, there are no human needs, only human wants (Ibid. 16), as if everyone always had a choice with everything. This is the so-called conflict between *revealed* preference and *hidden* preference (Malloy 164). Granted, everything has a value, but the assessment of a value is a complex task, and it might be difficult for the law (or the justice mechanism in general) to change people's behaviour overnight. Inasmuch as preferences reflect experience, it may be far-fetched to try to compare preferences across a random section of the public, the difficulty stemming from interpersonal utility comparisons (Is *my* dollar really equal to *your* dollar?). This is the question of valuation. Valuation is the process of determining a value in a particular situation for some parties, identified or unidentified. Valuation is critical in many interpersonal exchanges, voluntary or involuntary. Of course, the seemingly most common benchmark of value would be the ongoing market value (or market price), which works best for things that are easily and commonly traded, have an objective price and are fungible (e.g., petroleum and gold bullions). It will not, however, work as well for goods that are unique (e.g., an heirloom passed down several

generations).<sup>157</sup> Non-fungible goods require some other common ways of market value appraisal, and these include comparable sales, cost of replacement and income flow analysis (Malloy 165). Needless to say, all these methods involve further devices and institutions such as time horizon, depreciation, discount rate and discounted present value, each of which coming with further implications and complications.

As a quick example, for the legal translator, there are some more economic concepts that involve value that may be of some relevance: externalities and risk. These constructs, which are easily found in day-to-day vocabulary, are often easily misunderstood and miscalculated. Risk, along with related terms such as risk assessment, risk management and risk communication, is seen in the news media, trade journals and the medical press, involving miscellaneous handling of data and statistics that may be misused and abused (Parkinson in Bartlett 99). As a consequence, an adequate understanding of how risk should be assessed and managed (and even exploited) is of the utmost importance, and economics, as a behavioural science, has a large role to play in discussing the trade-off inherent in any choice being made given all inherent risks that come with that choice (Ibid. 106). This is important for legal translators, as, despite their self-pride for their work, little do they know that every step they take and every word/phrase they render carries with it some potential risks that may potentially lead to some unexpected consequences.

Regardless of how value is determined, one thing is for sure; there can be two perspectives to the intended effect of all rules and norms: *ex post* and *ex ante* (Farnsworth 5). As a matter of fact, this has always been part and parcel of economic methodology. Take criminal law for a quick analogy. There are two types of punishments (actually, more broadly, there are two lines of thinking): *ex post* and *ex ante*. The first perspective could also be called “static”, since it accepts the parties’ positions as granted and fixed, and the second perspective could be called “dynamic”, since it assumes possible changes in the parties’ behaviour in light of what others (this includes judges and potential victims) do (Ibid.). While it may be argued that the right incentives must be given to all potential offenders (i.e., “making an example out of this case”), how we achieve that by imposing on

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<sup>157</sup> This makes one strong argument against damages for emotional distress vis-à-vis damages for material and physical injury.

current criminals the appropriate penalty (i.e., “let the punishment fit the crime”) is still an open question. Apparently, Farnsworth thinks that a court’s decision will almost always take into consideration both effects (Ibid.). Without denying the value of law and economics, Mattei and Monti even claim that the economic analysis of law, at least in the “conventional” sense, needs to employ comparative law for a valid epistemology (Mattei and Monti: 1).

However, as a timely (or untimely, depending on one’s stance) antithesis maybe, not everyone has the same (romantic) impression of economics or the teachings of economists. Harvard moral philosophy professor, Michael Sandel, for one, has long been critical of dominant capitalist economic views without dismissing them altogether. In his work *What Money Can’t Buy*, he has a chapter entitled *Jumping the Queue*, in which he outright laments the “marketization” and “dollarization” of everything from game tickets to access to establishments like Capitol Hill, from guaranteed doctor appointments in a pinch to airport security fast-track privileges (Sandel 2012: 17 *et seq.*). And Sandel is not alone; he is joined by White. For his part, White has been very vocal about his disapproval for the claim that everything that can be appraised with market price and other market devices should be so (White 84). As we shall see, in the eyes of the welfare economist, these are merely examples of optimal control of opportunity costs, which, like all costs, should ideally be kept to a minimum. Indeed, in recent years, the market mentality, which provided the ultimate justification for human beings maximizing their own welfare, is creeping into just about every aspect of human life—even those that used to be governed by non-market norms, and this unquestionably has sparked public outrage on an unprecedented scale. On the one hand, people are “encouraged” by economists to breach a contract or void a marriage in defiance of strong moral teachings as long as greater overall utility will be expected, while on the other hand, economists need to make the occasional review of things like ethics and morality stressing that whatever they are promoting will not entail any compromise of age-old spiritual values that are venerated and cherished by all (Well, if it is airport security fast-track access being traded and marketed today, what is it going to be tomorrow? Human organs? Who knows if it will all go down a slippery slope?). Don’t prices direct people in the wrong direction sometimes? Thus, frankly, economists did not get caught in the crossfire between equity and efficiency for nothing; it is something they

need to face up to and clarify if they expect prestige and respect from people outside their discipline. In any case, despite Sandel's moral concerns, he does implicitly confess in his work how pervasive—and persuasive too—the practice of understanding all human action via the market mechanism has become in recent decades, having spread beyond academia little by little (Sandel 2012: 51). For this very reason, I will have a whole sub-chapter dedicated to the potential challenges that economics faces in regard to the dilemma coming up shortly.

Now, having covered the basics of economics and how it has contributed to the widening of human knowledge as a methodology, let's take a look at what it has done, as well as what it may potentially do, for translation studies.

#### **D. The Current Status of Economics in Translation Studies and a Methodological Framing of an Economics of Translation Studies**

Now that we have a rough idea of economics and its methodology, we, as translation theorists, must understand that whatever (if anything at all) comes out of that approach depends not just on economic theory *per se* but also on the facts of the real world to which the theory is being applied (Friedman 2000: 317). In other words, the area (in my case, legal translation) to which economics is purportedly being applied needs to be able to accept and appreciate economics for it to flourish. Apparently, translation theorists have no trouble believing that translation is basically about making decisions; knowing how to make decisions and how to choose (and how not to choose) is a most relevant element in translation practice as well as in the pedagogy of translation (Munday 2009: 60). As well, decision-making processes are closely related to problem-solving activities, of which translation is one (Ibid.). And yet, regrettably, the hard fact is that economics, a social science and a behavioral science centered on human nature, has yet to find its way into translation studies as a methodology.

Quite a while ago, academics used to lament that while social and societal questions never went totally unknown in translation circles, the issues raised never really got addressed

systematically, let alone digested into scientifically persuasive theories (Wolf in Wolf: 13). This might indeed have been the case for sociological methodology (in regard to its application for translation) two decades ago, but economics received no better treatment from translation theorists. Powerful and useful as it is, economic methodology has been largely overlooked in translation circles, much to the peril of translators and, worse yet, with a detrimental knock-on effect on the development and maturity of translation studies. Just like learning a new language, which many translators have had to do more than once in their lifetime, translation scholars should start learning to approach things that they are used to perceiving in a certain way in a different light and also, at the same time, they should learn to envision the same phenomena in different contexts and through different lenses. Indeed, a functional and meaningful methodological framing of translation studies via economics requires a close glance at how the methodological framing of a sociology of translation got improvised, developed and flourished over the years. Basically, this is exactly what an economics of translation is all about.

At its very core, sociology is known as the scientific study of society, with key underpinnings generally including social groups, relationships, socialization and social movements, just to name a few (Tovey and Share 2003: 3).<sup>158</sup> To boot, mainstream sociologists consider sociology an applied social science, and, as such, expect it to provide empirical data by which public policy can be guided and tested just like all other social sciences such as economics and political science (Ibid. 23). However, it did not take people too long to realize that some minor revisions to this position may be needed for a sociology of translation studies to work. Drawing upon the earlier works of sociologists, Wolf concludes that topics that can be subsumed under the grand title of a “sociology of translation studies” include sociology of agents (Ibid. 14), sociology of the translation process (Ibid. 15) and sociology of the cultural product (Ibid. 16). Apparently, for her, these three—and only these three—elements deserve the scrutiny by a sociologist. The translator, who is apparently one of the many agents in the translation process working alongside other

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<sup>158</sup> There is still heated debate as to whether sociology is a science, and if so, what type of science. On the one hand, some sociologists believe that it is a science that could be enlisted to control human behaviour and the development of societies, whereas, on the other hand, sociology offers an intellectual foundation for the emancipation and autonomy of all mankind. Of course, clearly, a thorough investigation of this dichotomy would be unnecessary for this research of mine. *Vide* Tovey and Share, p. 7.

agents like the producer, the author and the publisher, is socially conditioned and subjected to the predominant power relations given the political and economic climate of the day, and he therefore needs to be scrutinized sociologically. By the way, the translator, who is considered an actor or an *actant* by some sociologists, may or may not be the focus of attention; rather, as far as sociologists are concerned, the process of translation along with the various stages along the way might sometimes generate more momentum than the translator himself—the person responsible for the translation, as scholarly attention is concentrated in ascertaining the “genesis” of a piece of translation, especially in a process-oriented and target-oriented translation model, in which the translator is but one agent or *actant* (Ibid. 24). Next, as far as the process of translation goes, there is a large number of determining factors in the course of translation whereby a source text becomes a target text, and they all follow, however tacitly, a regime or a protocol of decorum and etiquette no different than a child learning how to meet and greet people in a socially appropriate way. This theory, which regards translation as a social discourse, naturally constitutes a key component of the sociology of translation (Wolf in Wolf 16). Finally, the acceptability of the target text, or the end product, needless to say, has to rely on the value accorded to the translation by the target readership, especially if translation is to be regarded as a cultural and communicative activity constantly traversing borders. To this end, the potential contributions of a translation relies heavily on its logistical distribution, which will eventually tie back into social identity and ideology as featured by the target culture. Of course, the social identity and ideology featured by a target culture will have a great deal to do with what the key social factors (gender, age, education background, economic development status...etc) are in that culture. In effect, this field (in Bourdieu’s sense) of an international market for literature is a venue where the forces of the promotion, the suppression and manipulation of translations (and their authors) all come together and interact, as stated in this paragraph by Wolf:

The conceptualization of a translation market that is hierarchically structured according to the weight of the various languages, a view substantiated by data on translated works in the international market, is complemented by illustrations of the forces operating on this market and contributing to the promotion, prevention and manipulation of translation (all emphases mine). (Wolf in Wolf 18)

To my surprise and unbeknownst to Wolf maybe, an avid proponent of the sociological turn, maybe, these interpretations of market forces and their implications would have been explained with economics just as well, if not better. In fact, the term “economics” (along with all its lexical derivatives) was mentioned several times throughout Wolf’s paper (as well as many other papers). Let’s start with the word “weight”, which presumably refers to the span of a language, often resulting from some form of invasion, military, cultural or economic.<sup>159</sup> True, the fact that some languages have a larger number of native speakers than others and the fact that some languages have official status in more countries and territories than others may be treated as a sign of power that was correlated to territorial expansion by force in the sociological context, but at the same time, it can also be the direct result of demand for and supply of a particular good or service. For instance, a literary work published in Lithuanian might not be able to reach out to as many readers as one published in, say, French because of the considerably smaller size of its native readership (in addition to its even smaller number of L2 speakers vis-à-vis L2 French speakers). Similarly, a work published in a language like French or English, by virtue of its large number of native speakers plus its even greater number of L2 speakers, will be readily translatable into more languages worldwide than, say, a work published in a language with a relatively small L2 population such as Finnish.<sup>160</sup> In the same vein, a language, especially an endangered one like Inuit, which is chiefly spoken by the First Nations people of Canada, might have trouble dealing with an overwhelming influx of foreign literature being translated into their language vis-à-vis their literature being translated into any foreign language, resulting in a net “deficit” in international or trans-border literature “trade” centered on translation. Then there is the overwhelming and seemingly unrivalled “hegemony” of the English language.<sup>161</sup> Venuti was quick to point out the low percentage (only 2% to 4% of the total

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<sup>159</sup> According to reliable sources, of the top ten languages in terms of native speaker count, no fewer than six of them have gained grounds with the expansion of a certain European global empire in the past five centuries: English, Spanish, Portuguese, Russian, German and French. Most notably, the expansion of the Spanish language, the earliest of them all, was also attributable to the Catholic Church. *Vide* Ostler, p. 380.

<sup>160</sup> Ideally, translation would best be carried out by a translator into his native language (and not *from* his native language). Thus, translation of a work written in Finnish into, say, French, should, ideally, be carried out by a native French speaker who happens to know the Finnish language, at least to some extent. Of course, there are exceptions to this rule.

<sup>161</sup> True, English is the predominant vehicle for the transmission of knowledge today, as it is the language in which most academic works are published, most non-local conferences are held, most reading is done and most lessons are taught. However, little do most people realize that its rise to prominence was actually a



publications in America and Britain combined) of translations into English, which he finds troubling (Munday 98; Venuti 1995: 12). Apparently, some languages are “translated into” languages, while some languages are more of “translated from” ones.<sup>162</sup> And why is that? The short answer might be that some languages are known, understood, spoken or appreciated by more people than others, but obviously, this does not capture the whole picture. Sociolinguist John Edwards proposed that many languages, such as Greek, Latin and French, became *lingua francas* in history did so because of the power that they represented—cultural, economic, political or military, and not because of the intrinsic linguistic quality (e.g., the aesthetics of the phonetics or the rhythm of the speech flow) (Edwards 40). Hence the famous adage “All roads lead to Rome” (Ibid.). Somehow, there must be something more to it, and for me, it must have something to do with economics, and Wolf’s use of the term “market” should more than justify my hypothesis.

In addition, there are the economic concepts of cost (especially opportunity cost), risk and externalities, which might also do a perfect job describing and explaining the many phenomena surrounding the global publication industry—including those raised above. In brief, “opportunity cost” refers to the loss from having to give up “the next-best choice”, and a publishing house printing and publishing something in Lithuanian (with all other factors holding steady) will, obviously, have a relatively high opportunity cost vis-à-vis one that prints something in French or German. Also, a translator who works in a rare language pair, say, Lithuanian and Maltese, might be in a better position to appeal to two target readerships in such a way that a “mainstream” translator (one working in, say, French and Arabic) cannot, thereby creating a huge positive externality for both target readerships (without either one realizing it). As a result, this kind of work will have to be more heavily subsidized by the state or by private NGOs for the internalization thereof to be possible and, in turn, for more potential translators fluent in these two languages to want to tap into this industry.

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relatively recent development in the broad sweep of human history. As recently as the middle of the 19<sup>th</sup> century to the middle of the 20<sup>th</sup> century, English, French and German enjoyed a comparable status as languages of scientific publication, with others, like Russian and Japanese, occupying scattered niches in particular geographic areas.

<sup>162</sup> In translation studies circles, this dichotomy is described by some as “central language vs. peripheral language”, while as “dominating language vs. dominated language” by others, Casanova being a prominent one of them. Either way, translation would appear as a venue of unequal exchange. For details, refer to Casanova in Baker, 2010, p. 285.

In Pierre Bourdieu's opinion, the agent is considered as an entity acting and wandering around purposefully based on his *habitus*, or his built-in and unspoken-of disposition, and within the greater framework of *field*, an objective structure (Gouanvic 2005: 148). In another sense, the three key notions: the *capital*, the *habitus* and the *field*, as introduced by Bourdieu and adopted by many advocates of the sociological turn of translation studies, can all be broken down into resources that are susceptible to market supply and demand. At a minimum, at an instinctive level, a *field* in the sociological sense is a platform or a venue where all agents come together to act and interact in connection with a specific event or task, while the *habitus* roughly corresponds to norms of the time and place and the *capital* loosely translates into the accumulated fame and prestige, whether cultural, social or economic. Advocates of the sociological turn of translations argue emphatically that translation—as a social practice—fits well into this framework. This layout resembles a market in the economist's world, not to mention that the term *capital* – in particular—carries with it a strong economic connotation.

Meanwhile, sociological concepts may have an economic aspect to them as well. Power, one of the key components to the sociological turn of translation, is essentially an intention to control the spaces and forms on a social interaction platform, and it can, interestingly, go hand in hand with self-interest, one of the key economic concepts (Malloy 65). Power is basically the answer to why “the haves have what they have” (Conley and O'Barr 1998: 8), and any discourse on power must inevitably touch on the fundamental issues of inequality and hegemony, both ramifications of uneven power (Ibid.). In addition, the concept of the “field” in Bourdieu's terms is, at the very core, a vast area where all agents, bound with their *habitus*, come together and fight for personal space, which amounts to yet another prospect on the innate and primitive human nature of self-interestedness. More specifically, granted, people ostensibly lay claims out of self-interest (e.g., by saying things like “This is *my* place”), but at a more in-depth level, they do so in order to gain control of more territory or more space by making others agree with and want to side with them (Malloy 65). In a more down-to-earth sense, consumerism, the economic view that economic life should be organized in the interest of the consumer and not the producer, feeds into the theory of consumer sovereignty in that it technically positions the consumer at the center of a social space in the realm of economics on the assumption that every consumer has their own

personal and unique utility function (emphasis mine) (Dixon in Bartlett 183). What this means for an interdisciplinary like translation studies is that the sociological approach and the economic approach to translation (or to anything else maybe) might not be as distant from each other as previously thought after all; they definitely are not mutually exclusive. They may deviate from each other in terms of the path taken, but they will ultimately converge in a sense.

Going even further, the major difference now lies in the way the two schools of scholars see and perceive things. While, in the sociologist's world, translation is being viewed as a social practice conducted in a broader social context by translators who are social beings, a similar framework may be constructed for an economics of translation, where translation is viewed as an *economic* practice conducted in a broader *economic* context by translators who are *economic* beings by economists. It then follows that translation would be a platform, or a space, where the translator is viewed as a producer, or at least a quasi-producer, who must pay close attention to the needs and interests of the consumer—the target reader. The final translation product/service would then be the product/service provided by the producer, of course, and the different stages of “finding the best text to translate” to rendering the text in the “right way” and then on to marketing the translation to the intended reader would constitute the entire production and marketing process. This cycle will, of course, repeat itself over and over again, and one contributing factor may become the outcome of a cause in due course. Under an orientation of consumerism, the view that advocates consumer sovereignty the most, the translator is to serve their reader—the consumer—who is located at the center of the space, and it is the reader—again, the consumer—who has the initiative to choose what to purchase; it is not the translator—the producer—who gets to choose what to produce, which would be the position taken by proponents of producer dominance. Of course, a topic like this involves interpretation of consumer sovereignty and would probably require at least endless brainstorming for there to be any sensible conclusion.

Again, it is not as if nobody has ever attempted to approach translation with an economic vision. On a prosaic level, Jeffrey Green, for one, has a chapter entitled *Translation as Transaction* in his monograph on translation entitled *Thinking Through Translation*. And

while I am not ready to consider this chapter of his as being academically economic, he has brought up a few ideas that can serve as an overture for my thesis on economics and translation. As an opening statement, he claims:

[...] translation is often a business arrangement. Someone who wants something to be translated pays someone else to do it. (Green 2001: 45)

In his eyes, there are three dominant parties in a transaction of translation: the author, the editor and the translator (Ibid. 47). Also, the translator wears more than one hat; he is first a reader, then a writer and finally an editor (Ibid.), and each of these stages requires a different capacity of the translator, and each of them basically makes one transaction (Ibid. 50). Apparently, as the centerpiece of Green's argument, translation is a venue where the aforementioned three parties come together and interact with each other, thereby forging some very dynamic and unstable relationships with each other and overcoming obstacles—expected or unexpected—along the way. This, in fact, at least for me, sets a defensible foreground for an economics of translation in that it regards the three major parties concerned as actors (without using this word) each with his own objectives (again, without ever using this word) that are usually egocentric, and constantly engaging in a “power struggle” (“game” in economic terminology) until the translation gets published (and sometimes even beyond that). I think that Green has come up with a preliminary solution for us without realizing it (if it was even his intention). Moreover, linguist David Everett states in his work *Language the Cultural Tool* that the idea of hierarchy, developed by Nobel economics laureate Herbert Simon, did not obtain its evolutionary status for nothing; hierarchical structures exist simply because they are the most efficient and stable way of organizing the universe, and this is exactly why hierarchy is detected in every human language in the world (Everett 201-202). Language is the tool with which our social world is created, and if language features something hierarchical to be economically efficient, then translation might also be a hierarchical thing.

On a more sophisticated level, then, of course, comes Jiří Levý, whom I consider a pioneer in my proposed area of study to a certain extent, by means of an example (the translation of the German term *Mensch*) excerpted from a work by German playwright Bertold Brecht, presumably made the first attempt at employing economic methodology in the translation

context by applying game theory. By calling translation a decision process, which would have been an excellent starting point, he argued that whenever the translator decides upon the rendering of one term, he will immediately be restrained with all his future renderings of the same or similar term (Levý in Venuti 2000: 149). In other words, for the translator, a previous choice he made might subsequently end up being his own undoing, for that previous choice just might get in his way of making the right call for the next choice. Thus, apparently, for Levý, a game is a situation in which one finds oneself restricted and “tied up” by all one’s previous choices. Much as I appreciate Levý’s good intention, he, to my dismay, did not seem to have utilized game theory properly, and nor did he have the correct understanding of what a game is. At a minimum, as we will see later on, a game should be a two-party situation involving some sort of coordination and/or competition among those parties (Leach 2006: 145-146). Typically, a game is studied by economists who want to determine what action each player will likely take, with all players assumed to make choices that will eventually amount to a Nash equilibrium, which is a state where each player, being agreed on one action among a list of a limited number of actions, cannot increase his own payoff by unilaterally changing his own action (Leach 146). Specifically, a game is by no means a situation where one person constantly makes decisions that come with consequences that he either appreciates or regrets subsequently.

Apparently, then, Levý did not fully understand the spirit of game theory. At the same time, however, I find it somewhat understandable that Levý would have an incomplete sketch of game theory. Truth be told, even economists themselves admit that game theory is hard to comprehend and is also often confused with stand-alone economic models (Reder: 283). In principle, the focus of game theory should be on the decision-making process of the individual participants, with emphasis on the calculation of the effect of contemplated actions upon the assumed actions of other players as determined by the rules of the game and based on the information available to everybody (Ibid. 284). Levý erroneously thought that game theory was about how far ahead a person is able to foresee and predict.

In more recent literature, economics has appeared scattered across a wide range of locales in translation studies—though not necessarily for the right reasons. In *Outline for a Sociology of Translation*, the co-authors repeatedly bring up the ideas of market and

economics, presumably treating markets and the economy of the nation as social phenomena. While this may sound encouraging at first, what they covered in their paper is mostly why certain works get translated and not others, why some authors get translated and not others, and, most of all, why some languages (like English) are translated from more than they are translated into and why some languages the other way round (like Estonian), which all, according to them, boils down to the potential economic interests or profits that may or may not involve international politics. While there is some truth to this, it seems to have missed economic methodology in the real sense in at least two significant ways. First, in making a claim that affords attention to the macro aspect of language and economics, these claims seem to focus on nothing but language and the translation a language is involved in (either as a target language or a source language) as a commodity, not to mention that they are not normally backed up by sufficient statistics and figures. Sadly, this would be no different than an airfare specialist reporting that an airline has had to terminate a certain flight after a certain number of years of service simply because the flight is no longer economically viable, or a particular air route market is booming because such and such airline carried a total of X passengers in the previous fiscal year. Second of all, while information on the worldwide translation publication market is of consequence to everyone involved in the long process of translation, a true turn or view on translation through the lenses of economics would require that some popular and widely accepted economic loci/concepts (such as externality, cost structuring, risk and equilibrium, just to name a few) be used for analysis—or at least a colorful background for the presentation of key practices and phenomena throughout the translation community.

Lawrence Venuti, a big name in translation studies, has written extensively in this very niche. It is no secret that Venuti has raised an important but sensitive topic in one of his works *The Translator's Invisibility*—a trade imbalance not in goods or services but in translation as a result of what he calls a “hegemony” with diverse and far-reaching implications (Venuti 1995: 15). As he claims, by routinely translating large numbers of the most varied English-language books, foreign publishers have exploited the global drift toward American political and economic hegemony in the postwar period, actively supporting the international expansion of Anglo- American culture (Ibid.). True, there are thousands of languages in active use worldwide today, and they are not of equal weight. Far

from it as a matter of fact. On the other hand, the same might not be said of legal traditions, whose total barely adds up to a modest seven or eight<sup>163</sup>. Second of all, a clear distinction should be made between economics as a methodology and merely arguing how a translator should get paid for how much work. Let us take a look at the sociological trend for a minute. As far as the sociology of translation is concerned, a translator having to self-censor is a real-life example of a socialization process of the locale the translator happens to be residing in. As the popular saying goes, “When in Rome, do as the Romans do”; if a translator wants to survive and thrive in a specific environment, then he will inevitably have to “give in” and join the crowd. It is never easy to swim against a strong tide of public opinion.

Sydney Vickars claims that a translation is essentially the outcome of a formula, the variables of which are culturally and economically defined (emphasis mine) (Vickars 2010: 1). He then goes on to claim that a translation becomes a transaction once translation theory takes up an economic aspect (Ibid.). To him, then, apparently, any economic activity must be a transaction; in other words, once we start looking at translation via economics, translation becomes a transaction. This I cannot totally accept. For me, economics as a methodology, can be employed to explain any phenomenon that involves human behavior (translation included of course), and such a phenomenon would not simply become a transaction just because of that. To think otherwise would be tantamount to saying that a translation immediately becomes a social movement once translation theory takes up a sociological aspect. Such thinking would undermine the status of economics (and probably that of sociology too) as both a subject of inquiry and a methodology.

At the very core, economics should be about the pursuit of the optimal choice on account of the opportunity cost and all constraints (including, but not limited to, time, finances and material resources) in the face of a dilemma, or at least a difficult situation with pressing issues. As well, people whose opportunity cost of time is high (like doctors) can afford higher financial costs while those whose opportunity cost of time is low (like a person out of work) cannot. So far in this chapter, I hope that I have conveyed to my readers the fine

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<sup>163</sup> The total number of legal traditions is debatable, and, depending on who is being cited, the figure can range from three to a startling ten.

and complex nature of economics as a methodology, however reluctantly, realizing that economics offers a very accurate sketch of the translator's tasks and the settings he often finds himself in. They should, in all likelihood, also be able to see things through the kaleidoscope of economics without necessarily labelling themselves as "economic naturalists". Indeed, every element in human behaviour can be thought of as a direct or indirect result of the interplay of costs and benefits that often require mental gymnastics to pin down, and it is precisely this mind-expanding perspective that makes economics capable of explaining almost everything in everyday life (from "Why do color photos sell for less than black-and-white ones?" to "Why do animal rights activists target fur-clad old ladies and leave bikers in leather jackets alone?") (Frank 217). More importantly, economics will prove to be useful as a framing tool for translation studies. Human society is abundant in signs and symbols through which human ideas are communicated, and law happens to be one of those signs. This, in turn, will require a culture-bound observation and understanding of everything of the individual, which is the legal translator in this context.

On another front, the recurrent cycle of conflict/dispute and conflict/dispute resolution has been part of human civilization since primeval times, and many human interactions could be understood as venues where rules are enforced by common tacit understanding backed up by revenge and sanction. Even to this day, despite the presence of centralized law enforcement, this is still obvious in the private arena where individuals come head to head with each other in defense of their personal interests; it is, understandably, even more obvious and pervasive in the context of international politics, where there has long been a desperate—yet still futile—call for a central government to emerge at the global and supranational level supported by a dispute resolution mechanism with some binding force. This may sound disconcerting and disheartening to the egalitarian and pacifistic ear, but it is an option nonetheless, which, thankfully, does not happen as often today as it once did. So, what should the law do under such circumstances? Since each player presumably knows their own interest best, it would probably be best for the law to just grant them property rights and a right to exchange and leave them alone. This then begs the question as to how to grant people rights and how to let them engage in exchange freely. As it turns out, in Friedman's view, at least economically speaking, legal rules might be the answer, as long as they are able to duly define people's rights and stipulate how disputes are to be



resolved (Friedman 2000: 311). This way we can be sure that all resources will end up in the hands of whoever values them most. Of course, this is probably too naïve a position, since in the real world, most transactions are made between the “wrong” parties, who may or may not know where their rights and interests lie, or people who never wanted to know each other in the first place; the law, or some outside force, will have to step in at some point.

Now, I would like to present an analogy that might suggest how game theory could have worked for Levý. To put what I presented in the previous paragraph in perspective for legal translation, perhaps—just for the moment—we can just think of the two legal traditions (along with their respective people and jurisdictions) as two players constantly playing each other with occasional overlapping interests and occasional conflicting ones. The legal translator is trying to render a legal text from one legal tradition that is currently only available in one language. He then

### **E. Potential Challenges to an Economics for Legal Translation: Some Old Wine in a New Bottle?**

There is always (at least) two sides to every story. In spite of the advantages of an economic approach to translation, there are still some problems to be resolved and challenges to be overcome. Anything that is mighty must be handled with care, and money is no exception, not to mention that human beings, as rational and self-interested as they are, tend to react swiftly—even blindly—to incentives. While I have been trying to argue for an economic turn that will add insights to the turns that have already taken place in translation circles, there are still some hurdles, mostly hidden from public view. And this weighs on me and my research.

For starters, across the banking circle, the 18th century British banking tycoon Baron Rothschild is well-known for this quote: “Buy when there is blood in the streets—even if that blood is your own”, which many people—religious or otherwise—would find highly controversial and even disgusting. At a minimum, economics, rightly or wrongly, ignites a fiery image of money for some, and worldwide, money, however paradoxically, is and has

been an object of intense controversy, appreciation and taboo. Many people enjoy pursuing wealth, while, at the same time, pretending that money means nothing to them. In short, money is everywhere, and it is also something that people love to hate and hate to love. For some people it is everything, and for everyone it is indispensable for their survival. Emotions aside, we, as critical thinkers, must not let fear and hypocrisy get the better of us. Truth be told, as economists have asserted time and again, the rigorous application of economic calculation for the purpose of comparison requires, to a large extent, expression of all values and notions—even ones that are not commonly appreciable—in a *numeraire* such as money (*italics original*) (Dixon in Bartlett 183). It is true that economists, who have to follow strict canons of scientific methodology, typically have a penchant for precision, especially arithmetic precision, whenever the use of mathematics, econometrics, statistics, indices and/or quantitative probability is involved (*Ibid.* 186), and yet, little do they know that the expression of a factor in numerals and figures *in se* and *per se* might not be the sole criterion for verification (*Ibid.*). This is particularly true when the value, concept or object under evaluation is an intangible and abstract one (such as beauty, legal certainty and how colloquial an expression is). Of course, prevention of any possible distortion by the researcher is always a must and can only be guaranteed with professional economic ethics, on which economist George DeMartino has a dedicated publication *The Economist's Oath*.<sup>164</sup>

Moreover, people, quite understandably, tend to harbor apprehension for the unknown and, as a result, often prefer to “stick to what they know” and steer clear of what they do not; besides, as with all political experiments, a new thing that looks promising today might not end up being “what it is cracked up to be” tomorrow. Even Peacock, a strong advocate of art through the lenses of economics and statistics, confesses that it is “only human to distrust things they do not understand” (Peacock 94). Economics, which is highly dependent on sundry figures, readings and statistics, is not entirely worry-free and can be abused, and thus one should always be “particularly careful in its interpretation” (*Ibid.*). The truth is, for some of our fellow citizens, the sheer mention of the academic enterprise

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<sup>164</sup> In this work, the author made two broad presentations: one for the case of professional economic ethics and one for the content thereof. His handling of ethics as an economist seems even-handed, and he concludes with a self-authored piece of writing titled *The Economist's Oath* (DeMartino 2011: 232-233).

of economics or the economy of the nation in the political sense, especially when it is an economy of exchange or a market economy, inevitably triggers great concern for morals and ethics—and with good reason, despite the fact that an exchange economy is what most people today are dwelling in—whether they notice it or not. In the simplest sense, some people find something like “quantifying the unquantifiable” a distasteful and degrading thing to do as this risks defeating the whole purpose for the unquantifiable thing in the first place (Peacock 80). For these people, mental states such as enjoyment and satisfaction are not to be measured in easily identifiable units in the first place (Ibid.), and yet, Peacock is still of the opinion that “some quantitative base for the allocation of subsidies must be in place” (Ibid.). While economists have been trying to pass their discipline off as a value-free and highly scientific one, many outside their discipline seem skeptical of their claim. Harvard philosophy professor Michael Sandel, for one, does not believe that each party’s preference should be given equal weight even in pursuit of maximum utility; instead, whenever market reasoning makes its way beyond the usual domain of material things and objects, then it will inevitably “traffic in morality”, i.e., take up moral reasoning which may work against the very existence of the thing/object under investigation (Sandel 89). Furthermore, in his work *What Money Can’t Buy*, illustrated with apt examples from real-life observations (e.g., sterilization in exchange for cash and paying schoolchildren cash or cash-like benefits for extracurricular reading), he continues on to show that market reasoning and moral reasoning make a terrible mix for non-market and non-material social practices (such as driving a vehicle with care and showing up on time for a class), and how introducing the wrong incentives and applying inappropriate methods may change the meaning and status of the social practice, causing well-intended schemes to backfire (Ibid. 89-90). Some of his examples (for one, the daycare center case) were confirmed by economists Levitt and Dubner with results from case studies conducted in Israel (Levitt and Dubner 20). However, paradoxically, there have been some empirical studies that show that an economic view might be too narrow and limited since individuals do not always act in a way that is supposed to offer them the greatest overall benefits (Engel and Munger 10). For instance, in the context of disability rights, the economist’s view is invariably that, in light of rationality, given adequate knowledge and resources, the individual with a disability will opt for the law whenever doing so would expectedly remedy a wrong, while in real-life,

disability rights provisions are typically considered far-fetched by them and, surprisingly, are rarely invoked (Ibid. 10-11)<sup>165</sup>. In addition, prices do fail sometimes, which is what leads to all sorts of bubbles (be it a real estate bubble or a stock market bubble) in the greater economy. This indicates some possible divergence from conventional economic theory under certain circumstances, which might, in turn, pose a challenge to seemingly well established claims, and even cast doubt on the legitimacy of capitalism itself (Porter: 241).

Unquestionably, for some proponents of utilitarianism, the debate over efficiency vis-à-vis equity will probably amount to little more than sophistry. These philosophers believe that moral philosophy is nothing but a “hurdle on the path” to an economic analysis of law (Georgakopoulos 2005: 21), while, on the other hand, for sociologists, understandably, an economic approach may feel like an unleashed beast that is about to invade, or maybe even annex, their long-held territory, and this is no matter of peripheral interest to them. What remains unchanged, though, is the position of economics being that the ideal of any system is the maximization of the individual’s satisfaction, and this is exactly why those believing in ethics and morality are inclined to reject the economic analysis altogether. While this does place economics in a special position in the taxonomy of philosophies, so say the same observers, it would undeniably be a major challenge to the economic approach at the same time. Luckily, the outlook is not so gloomy. According to Becker, while the economic approach will provide a new perspective, it by no means indicates that the economic approach is necessarily more important than those held by other social scientists (Becker 14); in fact, not only will the status of other social sciences not be sacrificed by one bit even after a full-scale integration of the economic approach, but all approaches might also be mutually supporting. Thus, all fears and anxieties, especially those of egalitarians, should be put to rest.

Furthermore, there is one more objection to an economic analysis—at least in the legal arena, and it has to do with the upholding of democracy, or more specifically, the belief in a majority rule (Georgakopoulos 2005: 37). In the eyes of supporters of democracy, any

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<sup>165</sup> While this example I am citing here does not directly concern legal translation and the general public that it is supposed to serve, it does make an acceptable analogy for our argument in regard to the applicability of the economic approach in a wide range of contexts.

proposition or idea must follow the majority's will instead of an economic demonstration of its desirability in order for it to be acceptable (Ibid.). Of course, in the eyes of the economist, such an outcome would be misleading in that a majority rule is likely to produce an inferior outcome, and any legal reasoning that defers to the majority's will instead of following a rigorous economic path will likely lead to very undesirable outcomes (Ibid.). After all, a populist view would be no better than a dictatorship because the crowd (or the "mass" in Marxist terms), which is often (mis-)led by a demagogue, is not always right. In any case, those who believe that the law (along with many other things) should yield to nothing but public opinion do appear to take a dim view of economic methodology (Ibid. 38).

Finally, the two most baffling but fundamental values for economists: equity and efficiency—along with the balance between them. Together they serve as the yardstick for almost anything—legal rules, government policy, corporate strategy—anything and everything that involves some change, and yet at the same time, they seem to be in constant conflict with each other. Regrettably, there is no way for me to steer clear of this conflict.<sup>166</sup> Hence, "Is there a Conflict?", the title of the first heading of the chapter of *Efficiency and Equity* in Polinsky's book *An Introduction to Law and Economics* (Polinsky 2003: 7) could have deservedly been mine for this research too. At the same time, this is, ironically, one of the few areas where the two disciplines of translation studies and economics potentially overlap each other. Translation theorists, represented by figures like Pym, Chesterman and Hermans, have long shown special interest in the ethics of the translator, constantly reminding translators not to abuse their unchallenged authority and special status. On the one hand, for Polinsky, efficiency corresponds to the aggregate size of "the pie", while equity is all about how to slice it among all parties concerned (Ibid.). On the other hand, for Friedman, the two values correspond with the two phenomena of distribution and allocation (Friedman 1996: 248). In his eyes, while the general public tends to think of everything as "income-distributional" (i.e., apparently, some people earn more money than others and they get to buy fancier cars and go to private schools), economists tend to think of everything as "resource-allocational" (i.e., how all cars produced get spread across the

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<sup>166</sup> In this regard, there have been many theories, algorithms and formulae being postulated by many economists, such as the

population, how education resources get allocated and how the two goods/services get allocated) (Ibid.). Despite his spate of explanatory and exculpatory remarks, he stops short of explicitly likening the dichotomy of “distribution vs. allocation” to “equity vs. efficiency”, though he does confess that economists have a weaker say on distributional issues (Ibid.). By now, it should be fairly obvious to all of us how difficult weighing the pros and cons in connection with the conflict between equity and efficiency can be, and this would probably be even more so when intangible interests (such as health and safety) are involved.

Alas, the dilemma between equity and efficiency has left economists and moral philosophers alike puzzled for centuries, and apparently there is still no easy way out. Is it always one or the other? And is the answer always a zero-sum trade-off? While there are voices in support of either one of the two values, interestingly enough, though, most of them seem to agree that income redistribution is costly and best achieved through the government’s tax and transfer system instead of by means of the law (Polinsky 10). However, upon further scrutiny, law and economics professor Polinsky, for his part, towards the end of his book, even modestly questioned the rationale for wealth redistribution by means of taxes and transfers, arguing that they might distort the usual balance among price, supply and demand in that they entail the sacrifice of “some efficiency with respect to consumption decisions” (Polinsky 148). In any case, he, as expected, strongly opposes any attempt to redistribute income via the legal system in the name of equity out of mere cost concerns (Polinsky: 153).

As previously mentioned, a wide range of assumptions must be made in order for economic doctrines to make any sense at all, and two of the core assumptions are the rationality and the self-interestedness on the part of human beings. Why do human beings act the way they do? Why are they considered rational, selfish, self-centered, self-serving, self-interested, sometimes taking things to the extreme? Is it simply because there are (or they believe there are) huge payoffs in the end in exchange for the trade-offs they have had to make during their actions in pursuit of the ultimate goal of economic equilibrium? This is what the efficient market hypothesis is all about, which claims that everything is best left to the market, which will self-regulate given the many sophisticated market mechanisms, and any

external intervention by any third party—the government, a foreign state or even the WTO—to regulate any aspect of the market is doomed to fail. Another one of the key concepts of economics, which was, fortunately, derived from the efficient market hypothesis and pertinent to the economic analysis of translation is economic equilibrium. In real terms, economic equilibrium is a point in the cost-and-benefit model where there can be no tendency and no incentive for further change and where the separate plans of buyers and sellers match up (Malloy 2004: 157). This finite point of equilibrium serves as the “ideal” efficient and utility-maximizing point for all parties concerned, and yet its occurrence can hardly be guaranteed (Ibid.). Despite its frequent non-occurrence, in light of the “prestigious” status of an equilibrium in economics literature, I will have a dedicated paragraph on an analogy between equilibrium (in the economic sense) and equivalence (in the translation sense) in Chapter Four.

Of course, given the wrong circumstances and intentions, economics might not necessarily present a rosy and bright future even for academics who admire its methodology; in fact, quite to the contrary, an engagement with economics does come with its potential risks and challenges. First of all, one needs to know what to measure in the first place and how to measure it for economics to work at all (Levitt and Dubner: 14), and this might not be as easy as it sounds for an economic approach to legal translation to work. Second of all, once again, there have to be a few assumptions of human nature such as people are driven—even manipulated—by incentives and the unreliability of word of mouth from peers, past experience and conventional wisdom, just to name a few (Ibid. 13). In addition, at a more secular level, even when all that is settled, there will be the omnipresent technical devices and apparatuses that are seen and used everywhere throughout economic computation—often in the form of econometrics and models backed up by mathematics, and all this, no matter how familiar it may appear to the economist, might sound almost outlandish to the translator’s ears, or the ears of anyone from an alien discipline for that matter (Reder 346). This, undoubtedly, will give rise to yet another controversy.

Despite all the potential controversies, it is still my firm belief that, in sum, as long as there is a consensus on translation essentially being a prolonged push-and-pull “power struggle” during which trade-offs are constantly and repeatedly being made by a good number of

participants against various values that may be mutually contradictory, who are all *homo economicus* themselves, and as long as translation is considered a lengthy and purposeful process conducted on a platform where people interact and behave strategically, then translation must be considered a type of strategic human behaviour worthy of investigation via economics.

Admittedly, again, Michael Sandel, one of the most outspoken academics to question the legitimacy and appropriateness of the economic approach, deserves a mention here. While he acknowledges the wide acceptance of the economic approach in many circles, he does seem to go to great lengths to downplay its relevance and validity. For him, obviously, money should just remain a medium of exchange and nothing more. Beyond that, then one finds himself ‘in moral terrain’ (Sandel 91). He makes no secret of his position that whether or not relying on financial incentives is a justifiable thing to do heavily depends on whether those incentives “will corrupt attitudes and norms worth protecting” (Ibid.). And, as far as the economic approach to legal translation is employed and accepted, my answer to the latter question will be a resolute and firm NO, for money terms are simply adopted for their objectivity and convenience—nothing more, with both values being brought into play precisely by the most fundamental attribute of money: medium of exchange. Who can possibly deny that—apart from rare metals like gold and platinum (which are actually quasi-currencies themselves)—currency makes the most objective benchmark that everybody can see and feel? (Now, seriously, do you think that two euro/pounds/dollars makes more sense or two oranges or two shovels?) German philosopher Georg Simmel believed that money is entirely neutral and value-free because it is only when people pay for whatever benefit they want with money that they do not care whom they are dealing with as long as they know that their merchandise is worth its price; by contrast, if they are paying for it with some non-money medium (such as a promise or a favor), then they will surely run a background check on whomever they are dealing with (Simmel 473). Thus, my position falls in line with those of these two great philosophers.

While, understandably, assumptions—especially *ceteris paribus* ones—must be made for the obvious reason that the world is just too complicated to make sense of without some sort of abstraction, economists are often accused of making ridiculously lofty assumptions



(Polinsky 2). James White, professor of English literature and law, is even more vocal on this. He went as far as to call the practice of treating economics as a system of values and evaluation “distorted” and “unrealistic”, possibly out of his repugnance for the practice of itemization and quantification of all human interactions as a hypothetical exchange (White 1990: 68). For him, every “exchanger” or economic agent is basically an organism living and faring in a natural environment where he interacts with nature and his culture, while, for him, economic models, to his consternation, are based on ordinary day-to-day exchanges that he finds exploitative. Moreover, he goes on to reject the claim that man’s wants and wishes, in terms of how they can be exchanged and traded, should be made the ultimate measure of value, implicitly rejecting the teachings of utilitarianism (Ibid. 70); instead, he insists on coordination, at least non-interference, with Mother Nature (Ibid. 71). He even sharply accuses neoclassical microeconomics of being exploitative and emboldening dominance and acquisition, stopping short of praising the Marxist view (Ibid. at 74). In the wake of his discontent with the general public’s praise for present market value through person-to-person exchange, he deeply bemoans the mainstream school’s failure to sufficiently value goods or resources of potential value such as solar power, fisheries, wind energy and other renewable resources (White 83-84). For his part, White, apparently, is strongly opposed to any academic effort to observe and explain everything in economic terms by considering everything a commodity (especially if it is a marketable one), dismissing it as exploitative and near-sighted, and yet he stops short of dismissing all modes of thoughts and arguments presented by economists altogether (Ibid. 76), while making a subtle contrast between an “imperialistic” form of economics and a “more civilized” one (Ibid. 78); in fact, in the end, he concedes that while law, for one, should “listen to” economics and be ready to use it when appropriate, it should never unconditionally turn itself in to this other “culture” (i.e., economics) (Ibid. 81). As a coincidence maybe, his position is seconded by Jeffrey Sachs, a leading economist who has published extensively on economic welfare, poverty and economic equality, and who, in his book *Common Wealth*, has an entire chapter entitled *A Home for All Species* dedicated to what economic development has done to Planet Earth’s ecosystems and biodiversity in the form of climate change, air pollution, financial crises and all (Sachs 139 *et seq.*). On the face of it, economic development is synonymous with human development, but for Sachs,

it will all ultimately come to a point where vast wealth is amassed by the elite few at the expense of the many, and what we are seeing in the ecosystem is just the tip of the iceberg. On the other hand, by contrast, David Friedman seems to harbor a more “pacifist” view of the interaction between law and economics in that in his work on law and economics entitled *Law’s Order*, in his first chapter *What does economics have to do with law?*, which is primarily an apology for the need of jurisprudence through economic lenses, he nonetheless went through the trouble of writing a paragraph explaining what the law has to teach economics (Friedman 2000: 13-15). Apparently, in doing so, he is being slightly more even-handed with law and economics.

To my surprise, even established economists sometimes seem to have reservations about the applicability and validity of their approach. Feminist economists, for their part, are challenging the neoclassical view in particular by doubting one of the “most established dogmas”: assumption of rationality (Ferber in Bartlett 150). To them, an individual, or an economic agent, constantly making fully informed and rational choices taking into account all potential costs and benefits—and risks—is little more than a myth, to say the least; put differently, a claim like “we are all economists” could serve as little more than one of blatant hypocrisy and ignorance. More broadly, commodifying inherently “borderline activities” (such as greenhouse gas emissions) and non-market activities (such as speeding) with a “shadow price” will be tantamount to encouraging it, in the eyes of economists who prefer not to buy into the idea of a cost-and-benefit analysis, a gist of welfare economics (Reder 362). And more specifically, even in the context of law and economics, an interdisciplinary endeavor that has proven particularly successful, academics do find sectors of their subject matter, or sometimes just the premises on which their subject matter lies, loathsome. For instance, while the claim that crime would be opted for by a potential criminal only up to a point where the potential outcome/gain from the crime is cost-effective might already be somewhat hard to swallow for some people, a figure such as an “optimal murder rate” or an “equilibrium rape rate”, which implies something highly immoral and horrifically violent, would inextricably invite even more controversy and despise (Cherry in Bartlett: 160). This does not, however, imply that engaging economics in legal research is always abhorrent and, thus, fruitless; it is perfectly possible to start with economic efficiency before ending with conclusions that fit well into our ethical intuitions

(Friedman 2000: 230). This is important because it lays down and smoothes the path for the quantification of intangible values, values that are most often dealt with in the interdisciplines of economics. Friedman states in his work *Law's Order* that:

Not only does economic theory imply that gains to criminals count, but a more careful examination of our own moral intuitions, motivated by economic theory, suggests that gains to offenders are not entirely irrelevant to our moral judgments. (Friedman 2000: 231)

By the way, a similar analogy could be derived from copyright law. In the event of alleged copyright infringement, there is usually more sympathy for the alleged perpetrator if he has never profited pecuniarily from the alleged acts (such as photocopying for one's own referential use) that may have exceeded the fair use allowance. Therefore, in the course of an economic analysis of anything, be it crime or a translator's choice of words, all values taken into account, good or evil (e.g., regionalism for translation and the likelihood of a witness testifying against the perpetrator), must be given equal weight, which may or may not eventually lead to the conclusion that we have been expecting. Either way, it should be interesting and intriguing, and it is probably in this sense that economics is considered value-free by some.

True, I may have gone to great lengths to explain the moral aspect to the economic turn of translation, but at the same time, we should not be too idealistic; instead, economic analysis is no idiosyncrasy, and it does come with its inherent shortcomings. As with everything powerful, prices must be handled with care, otherwise it could lead to unintended consequences (Porter: 11). First and foremost is the quantification of things and values using currency. As Peacock suggested in his book, as art is no trade or business, and therefore familiar indices encountered in the financial world like return on capital invested, equity per share (EPS) and share prices as reflected on the stock exchange are no reliable indicator of success (Peacock 78). Then comes the (im)possibility of assessment, evaluation and comparison of losses and gains in value in monetary terms. While most seem to agree that the dollar value should be determined by the affected party, some, Polinsky being one of them, acknowledge the possibility of exaggeration on the part of the injured party, especially when there is a non-standard or unique (non-fungible) good (such as an heirloom) or benefit (such as a scenic view) involved (Polinsky 163). Indeed, in relation to

the quantification of non-material goods and intangible assets such as special conversation skills and a professional license, economists and lawyers alike confess that it would be tantamount to opening up a potential floodgate, as the case of *In re Marriage of Sullivan*, in which a spouse was claiming a community property interest in her husband's medical degree and medical practice, has plainly shown<sup>167</sup> (Laurence and Moore in Bartlett 1997: 64). Of course, leaving it to someone not affected would not make much more sense either, as, ontologically speaking, someone (unless that person is a judge or an adjudicator, who would be doing it for some near-divine reasons) with no right to something in the first place should not be allowed to determine the magnitude of its loss or damage. To this, economists concede that some values (e.g., how big the success of a business is and how faithful a translation is) will be rather subjective and susceptible to the identity and status of the evaluator (e.g., how corporate social responsibility works for the business model may be perceived differently by a shareholder, a manager, the CEO, a consumer and an employee) even if a familiar metric like profitability is adopted, let alone when a less objective and less "overriding" metric, such as working days lost and negative publicity incurred, is adopted) (Peacock 79).

Now, again, for a clear and convenient path towards an economics of translation, we should probably take a look at what challenges, some of which still exist to this day, the economic analysis of law has had to experience and overcome over its decades of development. There are roughly two approaches to law and economics: the positive one and the normative one. The positive approach uses economic theory to explain and predict certain facts, meaning it can be used in either an *ex ante* way or an *ex post* way (Faust in Reimann and Zimmermann: 839). On the other hand, the normative approach serves to ascertain how legal rules should be designed to satisfy the most needs possible by the most people possible (Ibid 842). Needless to say, relatively speaking, the positive approach is much less controversial than the normative approach, for the normative approach constantly engages itself in walking a fine line between equity and efficiency (Ibid 841).<sup>168</sup> Either way, the three core tenets of the law should be justice, rights and principle of law, and an economic

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<sup>167</sup> 134 Cal. App. 3d 634, L.A. No. 31653. Supreme Court of California. December 31, 1984.

<sup>168</sup> Truth be told, the positive approach is not totally uncontroversial either; it has stirred controversy in scattered areas such as risk.

analysis of law seems to challenge, if not subvert, these three tenets. At a minimum, in most cases, from a purely economic perspective, money is the most common means for fulfilling a compensation, as it is presumably redeemable (or exchangeable, depending on one's perspective) and fungible for virtually every non-heavenly good and service, and, more broadly, all involuntary loss can be (or can be assumed to be) made up for, and the economic agent is assumed to be willing to give up whatever benefit or interest (be it freedom or limb) is at stake—as long as “the price is right”. Needless to say, a claim like this will spark enormous public outrage for its plutocratic orientation.

And the challenges that confront law and economics do not stop there. More specifically, while it is true that much of the controversy is centered on the standard assumptions about human behavior and motivation that are native to economics but extraneous to law, there are four other elements, which are referred to as “complications” by Harrison, that has added risks and challenges to what would otherwise be a smooth path (Harrison 2000: 49). The four elements are lexicographical ordering<sup>169</sup> (Ibid.), exogenous and endogenous effects (Ibid. 52), the theory of the second best (Ibid. 53) and variations in a sense of justice and entitlement (Ibid. 55). Let's now discuss them one by one very quickly.

Lexicographical ordering is primarily the thesis against the claim that every utility or benefit can be reduced to a common denominator (typically currency) (Ibid. 50).

Essentially, what it claims is that, just like entries in a dictionary, some values must be ordered and ranked in such a way that they are not substitutable with values of a different order, and compensations and incentives should not always be reduced to monetary units (Ibid. 52). Second of all, certain values and preferences are exogenous in that they are considered given, stable and constant in most economic analysis (Ibid.). Consumers' tastes (presumably) hold steady despite the occasional fluctuation in price be it for chocolate or gold. The same cannot be said of an interest that is being dealt with by the law (*Rechtsgut*). Take speeding for instance. A change in the fine or penalty for speeding may have an impact (either positive or negative) on the motorist's behaviour *and* his preferences too, as it would indicate the public's disapproval/approval thereof. The same could be said of any crime (murder or fraud) (Ibid. 53). Thirdly, the theory of second best is about the noble

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<sup>169</sup> For this one, I prefer to use the term *lexicographical* instead of “lexical”, which was the choice of the author being cited herein.

ideal of allocative efficiency, which may or may not occur (Ibid. 54). Essentially, what this means is that no matter how hard economists aim for efficiency by making markets as competitive as possible, there will always be some markets that will never be competitive, and there will be no way of stopping the effects from spilling over into other related markets (Ibid. 55). The central issue here for law and economics is that the law and legal reasoning might not be ready to accept any “second best option”. Lastly, there is a wide variation in how justice is perceived across the general public, which is sometimes hard to pin down via economics. Simply put, individuals may differ greatly on what they perceive as fair about something when it is barely available on the open market versus when it is in their possession, and, as a result, this may make their judgment of fairness/equality volatile and unstable (Ibid. 56). This is particularly important when normative judgements (i.e., what laws *should* look like) are being made in the course of an economic analysis of law. This last element is quite relevant for research on translation for it takes into account the sentential context of the translation being carried out (why “right” for the term *Recht* when *Recht* is being used in context A and why “law” for the same term when it comes up in context B).

Maybe we should now revert back to the economic analysis of translation and give it some serious contemplation. What do all the potential challenges mean for translation?

Admittedly, again, all these challenges, which all reflect some controversy to some extent, seem to largely center on ethics, which is what it all boils down to, and this, of course, includes research ethics, in light of the possibility of the economic analyst swaying or distorting the data in an effort to skew the data just to “arrive at” and “confirm” his prior beliefs (Polinsky 166). Of course, as this pertains to ethics more than it does to economic analysis *per se*, as long as the researcher (be it the legal professional, the translator or the professor) keeps ethics in mind in the face of a multitude of values that are hard to assess and evaluate, economic analysis will work very well for everything. And this includes the description of the legal translation phenomenon.

Second of all, not only do economists believe that everything from commodities to mental health and justice can be measured with currency, they also believe that any two things can be compared with and evaluated against each other on the same scale. And some people, as

we have seen previously in this project, may find this line of thinking morally objectionable. This will obviously be another challenge to the economic turn of translation studies, for translation, legal translation in particular, involves values that are simply too lofty and noble for the translator in charge to be allowed too much latitude with the processing and handling of the text. While, on the surface, legal translation may appear to be carried out for the convenience of and the respect for some people (hence the multilingual immigration and customs forms at international airports), it is ultimately about justice, or more specifically, about doing justice to either the lawmaker, who is the author in a way, or the target audience, whose legal rights and interests are in need of protection, or both. But should this preclude values in legal translation from being expressed in currency terms? My answer would be negative, as I think that their anxieties are merely a product of their own creation. And why?

It is quite simple actually. The way I see it, learning to see things in terms of money/currency will not dilute the value or the sanctity of them *per se*; quite to the contrary, it might even contribute to their value. With regard to this position of mine, I was deeply inspired by Peacock, an economist and musician who has a full chapter entitled *The Economists and the Musician*, which is but a chapter of his larger book *Paying the Piper*. In his own view, he does not consider the two professions that he can claim, or the two objects of study academically speaking, mutually contradictory. As an integral part to his proposal for a subject of academic query named “cultural economics”, he made every effort to promote the idea that government subsidies might not necessarily be fair and efficient in regard to optimal allocation of funding and resources, as government funding is largely dependent on government budgeting and area-specific policies, which, sadly, has a great deal to do with partisan politics, and, as such, are not totally merit-based. As well, odd as it may seem, he starts out by encouraging music students to look beyond their immediate job prospects and forgo reliance on government funding as a hallmark of professional appreciation and respectability (Peacock 145-146). He then goes so far as to make a parallel between the distinction regimes for economists and those for music composers<sup>170</sup> (Peacock

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<sup>170</sup> According to Alan Peacock, in the realm of economics at least, Nobel prizes and memberships in national academies (such as the National Research Council of Canada) are usually awarded to top economists who have added a new twist to very complicated economic models or who have invented an innovative conceptual

147). Admittedly, not only will using a “secular” and “materialistic” thing like economics as a benchmark for something as “heavenly” as an artistic work not diminish the value of such works, it might also allow artists and the audience they are supposed to serve and appease to appreciate their works more by weaning themselves of the government funding that comes through a prolonged “food chain”. Put another way, if one could learn to conform to current market forces and marketing trends, then one may be able to go higher up the ladder by stopping “putting their trust in princes” (Peacock 145). In brief, the market should be the benchmark for art.

Thus, on a concluding note for this chapter, I personally will hardly be surprised if I ever hear economics being labelled a pseudoscience by the legal translator, or just any translator. Nor will I be surprised if translation theorists jump to the conclusion that an economic turn (if there is one) is all about how and how much money translators are getting paid for their work (Say, are we to go by word count or hours on the job?). Claims like these, however disheartening, are simply the direct consequence of how little the general public knows about translation (along with the disrespect that comes with the ignorance) and how little translation theorists are aware how many fields of research (in this case, economics) might have an impact on them and their research on top of the ones that they are (relatively) familiar with (such as sociology). Fortunately, this does not spell the end of the world for any of us; it simply indicates that there is still room for improvement for a stronger advance in translation studies by learning from the mistakes that law and economics had to go through before becoming a glorious interdisciplinary and also by bypassing the old rut that it left behind. I am confident that all potential challenges will eventually be overcome given the moral fortitude that economists have demonstrated with their openness towards different views and positions (some of them even self-incriminating) regarding their subject.

Now, I would like to move on to the details as to how economics can serve as a tool, a locus, a trajectory and a perspective for legal translation. I plan on achieving this by introducing a number of key economic paradigms/perspectives (choice theory, game theory

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framework for their discipline; in most cases, however, it is not normally granted to those who have merely succeeded in selling their ideas to the lay public through application of their professional skills. *Vide* Peacock, p. 147.



and cost-benefit analysis) and running a few key economic loci that I find useful and relevant through the “function” of translation in the next chapter. My readers should bear in mind, though, that sophisticated as they are, all my theories will come with some inherent constraints and limits that are hard to overcome.

## Chapter Four: Legal Translation through the Prism of Economic Theory

The question of markets is really a question about how we want to live together.

(Michael Sandel, *What Money Can't Buy*, p. 203)

### A. Brief Overview

Legal translation is difficult because of the languages involved and also the legal systems involved. For example, the recognition of legal qualifications in the EU today is a very thorny issue precisely because of the differences between the legal systems of all member states, which, in turn, has made the legal profession one that is more regulated than most others (Barnard 316). The complexity in the translation of legal texts across legal systems/traditions should be easy to understand. For better or for worse, despite its success, economic methodology has not provided equal insight into every kind of human behavior, but things are definitely improving. As Becker frankly confesses, economics has not been sufficiently applied to political behavior (like voting in an election), but, at the same time, it is, little by little, moving into areas that were once intractable, such as fertility and marriage (Becker 9) and, more recently, the evolution of language, the extinction of animals and suicide (Ibid.). Apparently, on the one level, economics has been heavily relied upon for the analysis of a diverse set of problems, and this trend will definitely continue. Furthermore, on another level, Reder asserts in his work that the impact of economic imperialism on the general culture may be even greater than on any of the social sciences (Reder 359). Now, why are some problems/concepts seemingly more suited for economic analysis than others? And was every theme coming under the scrutiny of economics there for the same reason? What is in it for legal translation?

The first and foremost thing would be choosing the right framework/trajectory/thesis of economics for smooth application to translation, as each frame of reference will have its very unique and probably exclusive implications (as well as shortcomings). For legal translation, due to the special and specific effects that legal language may cause, the rhetorical devices introduced by Hermagoras of Temnos (2nd century BCE) of *quis quid*

*quando ubi cur quem ad modum quibus adminiculis* (literally: “who, what, when, where, why, in what way, by what means”) for most genres of translation might not automatically apply (Simonnæ s (b): 152). In light of this inherent nature of legal language that is unique to legal texts, over the years, there have been a few serious attempts at an economic (or an economics-like) approach to translation, except those attempts either did not go deep enough or were just outright wrong. Take Jiří Levý, the translation theorist previously mentioned, as an example. Much to my dismay, while he made an intellectually daring endeavour to establish a link between game theory and translation by likening translation to a game, he did not, however, interpret and apply game theory correctly; his understanding of what a game is and how game theory works was utterly wrong. What he presented and postulated, again, had more to do with bounded rationality, which would have made another interesting discussion topic<sup>171</sup>. In short, bounded rationality, a term possibly coined by Herbert Simon in defiance of the widely accepted assumption of rational behaviour on the part of the individual, refers to the finite limit to the amount of information the human brain can store and process at any given time, and the amount of calculations it can conduct. Theories that incorporate constraints on the information processing capacities of the actor may be categorically called “theories of bounded rationality” (Simon in McGuire *et al.* 1972: 162). Bounded rationality occurs because of a wide host of factors ranging from risks and uncertainties, incomplete information about alternatives and assumption of complexity (Ibid. 162-164). In the end, Simon used the game of chess for an analogy, demonstrating that a chess player can only “think thus far ahead” and generate only a small number of feasible options to choose from and “make a pick” as soon as he sees one that he considers satisfactory (Ibid. 166). Essentially, this is exactly what satisficing<sup>172</sup>, as opposed to maximizing, is all about. According to choice theorist Barry Schwartz, a maximizer seeks and accepts only the best, while a satisficer would settle for something that is good enough for their basic criteria and standards at a certain time and place without worrying about something “better” coming up later (Schwartz 2004: 77-78). Because of its

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<sup>171</sup> Although bounded rationality will not be covered in this chapter, or even in this essay of mine in detail, it does have a great deal to do with consumer behaviour and choice theory and would thus make an excellent topic for another research—one that might well concern legal translation.

<sup>172</sup> Apparently, morphologically speaking, the verb *satisfice* is a blend of the two separate words “satisfy” and “suffice”.

persuasive and useful theme, the doctrine of bounded rationality has won near-universal recognition across the business and financial world.

Meanwhile, the wide reception of economics in a number of neighboring disciplines is truly remarkable, and a brief look at the history of the burgeoning field of law and economics—one of the most successful ones in this respect—will provide us with enormous insight. On the whole, the economic approach to human behaviour in general, as postulated and promoted by Gary Becker, seems to have provided a remarkable conceptual framework for law and economics<sup>173</sup>, in which the application of price theory and optimal resource allocation on the basis of the price-quantity (cor-)relations is characteristic and representative, leading to near-universal application (or attempted application) of economic methodology (Reder 345). He is even praised by Posner for his great contribution to economics by having expanded the economic approach to a wide range of theses, especially non-market ones (Posner 60). Of course, once the economic approach is decided upon, then the sociologist or the political scientist or the jurist, whatever the case may be, will have to familiarize themselves with the nuts and bolts, as well as the merits and demerits, of economics, econometrics and several relevant branches of mathematics, which could prove to be quite a challenge for someone with only basic acquaintance with mathematics. This, quite possibly, is one of the reasons why it has been difficult for economics to make its way into mainstream translation circles.

Once again, in order for the economic approach to work, we will have to yield to the so-called “imperialism of economics”, which was cited earlier in this essay, to a certain extent, for it will inevitably alter social and interpersonal relationships to a considerable degree. This would be the inevitable result of assigning a price, or at least a “shadow price” to everything and seeing every interaction as a market transaction. All parties involved in a translation event (the translator and the publisher...etc) will have to be considered rational individuals, each with their interests and objectives no different than consumers, job seekers or juvenile delinquents. In particular, the impact of economics on the belief structure among the general public is conspicuous in the legal system (Reder 360), since, of

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<sup>173</sup> As a matter of fact, Becker did make a brief mention of economics being used to analyze the legal system in his 1976 work *The Economic Approach to Human Behavior* without going into further detail.

course, seeing interpersonal relations as quasi-market transactions, which were traditionally meant for commodities, might alter the meaning of rights and duties for most people. In addition to the commonplace theses such as treating “pay as value” and translation values (such as physical length, typography, regionalism, political correctness...etc). as marketable goods or services, Reder came up with something novel, claiming that another channel through which economic ideas are increasingly entering the greater culture is public opinion, which is sometimes overwhelmingly powerful, as to what is credible. In other words, through its impact on the public view about how the world works, economics will influence how the world actually works (Reder 360-361). And this is something translation studies should be proud to be a part of.

Economic insights such as risk management, adverse selection and asymmetry of information...etc, which have all helped with the approach to and resolution of legal issues like health insurance, genetic testing and bank credit approval, could conceivably have a bearing on the economic aspects of legal translation. This can be accomplished without the risk of becoming too economically reductionist about values like human life and mental health (Horrigan 2003: 112). This is important because the process of legal translation, which is already lengthy and intense, is often subject to strict timelines as legal translators are typically pressed for time and risk having their clients’ documents rejected by the court if they miss the deadline.

In the rest of this chapter, as soon as I have covered Saussurean linguistics (in subchapter B) in conjunction with the challenges arising from the differences in legal tradition, I would like to examine, evaluate and validate some economic concepts that I consider most fundamental, and then, most importantly, run legal translation through all of them like light running through a prism with a view to establishing a valid and useful link between translation studies and economics. Therefore, at the end of subchapter B, this chapter will bifurcate into two sections: C and D. First, in subchapter C, I will examine a number of economic concepts/loci (such as externality and risk) that I find potentially useful for legal translation and possibly also translation theory in general, and then in subchapter D, I will run a host of legal translation problems/practices/devices, which easily invite intense debate, through the prism of economics with the aforementioned economic loci kept in the

not-so-distant background. There will be four of these problems/practices: term banking, co-drafting, jurilinguistics and legal transplants.

For starters, the economic concepts/loci include rationality, self-interest, utility/profit, risk, resource allocation, externalities, asymmetry of information and moral hazard. Next, some key concepts of individual branches of economics (such as welfare economics, political economics...) will have to be introduced and examined. Also, things like welfare (social/collective welfare and individual welfare), which undoubtedly has some bearing on wealth redistribution, renewable common property resources, coordination games...etc., with a quick reminder note on the mistakes committed by Jiří Levý, arguably the first in translation studies to have attempted to approach translation as a game (in the economic and mathematical sense). I have selected those few economics-related loci to be covered in the body of this chapter for their importance and relevance to legal translation. I will call them fronts or trajectories interchangeably, and their relevance will prove very important as this chapter unfolds. It is my belief that by juxtaposing such a wide range of loci of economics to run legal translation through, not only can we compare and synthesize all these economic trajectories/loci, but we can also realize why Levý was mistaken and how a lack of true economic perspectives is slowing down the smooth development of translation studies. But before that, I, by way of the linguistics of Saussure, would first like to illustrate and explain why a change in legal tradition will most certainly pose a significant challenge for the legal translator and how the economic approach may be of some assistance to him.

#### B. Legal Translation across Legal Traditions: Inspiration from Saussurean Linguistics

To begin with, legal translation theorist and comparative law scholar Gérard-René de Groot is a source of inspiration here. The complexity in legal translation depends on the languages concerned and the legal traditions involved, and, thus, there could be a total of four possible scenarios. (1) Where the two legal systems and the languages adopted by those legal systems concerned are closely related, such as between Spain and France and between Denmark and Norway, the task of translation is relatively easy; (2) Where the legal systems are closely related but the languages are not, legal translation will not entail extreme difficulties, such as translating between Dutch and French; (3) Where the legal systems are

different but the languages are related, there will be considerable difficulty with the main difficulty lying in the handling of *faux amis*, such as translating German legal texts into Dutch and Dutch texts into German; and (4) Where the two legal systems and languages are totally unrelated, the complexity becomes, conspicuous and formidable, such as translating common law (most likely) from English into Chinese or Arabic (de Groot 1987: 798-800). In short, the degree of difficulty and complexity of legal translation is closely correlated with the degree of affinity of all legal systems and all languages involved (Ibid. 800). While de Groot's brief generalization may be true, let us now have a more in-depth look into what impact space and time can have on legal translation from a purely economic-linguistic perspective.

Legal translation is a fascinating activity boasting a long history since the early days when translators proudly translated the *Corpus Juris Civilis*, which was originally written in Latin, first into Greek and then into numerous other languages at the height of the Roman Empire. As if the translation itself and the miscellaneous language issues it already entails were not baffling enough, legal translation that involves rendering a text across two legal traditions, both of which come with their respective terminology that is highly system-bound, would be like multitasking or performing a double duty that requires extra skills. At a minimum, legal translators should bear in mind that a legal text must be dealt with as a whole and integral instrument for the purpose of translation, and learning to look beyond individual legal terms is a skill every legal translator must learn. Legal translation involving a change in legal traditions entails quite a few risks and challenges, and perhaps no one has explained the inherent difficulty better than Sylvia Smith. In light of the fact that the relentless pursuit of accuracy in legal translation requires some special qualities of the translator, Smith, in her paper *Culture Clash: Anglo-American Case Law and German Civil Law in Translation*, which was cited earlier, claims that the system-bound nature of a legal text means that a successful rendering of it into another language requires competency in at least three separate areas: first, a basic knowledge of the legal systems, both of the source and target languages; second, familiarity with the relevant terminology of both sets of legal languages; and third, competency in the specific legal writing style of the target language. Without these competencies, the legal translator's rendition will amount to little more than

a word-for-word substitution that legal professionals may find incomprehensible (Smith in Morris 1995: 179-181).

However cynical it may be to argue that cultural untranslatability will always exist in any process of translation, needless to say, though, legal translation would immediately remind the translation theorist of the “noble” policy of equivalence, which seems especially important for legal translation but difficult and controversial nonetheless. This has dissuaded some scholars of the idea of equivalence altogether for legal translation, dismissing it as nothing but an “illusion” (Galida 2003: 1). As a quick revelation of my position, it is my firm belief that while equivalence should still be given its position in the interlingual rendering of legal texts, it should be achieved at not the word/term level but at the sentence level, if not the overall text-level, and also this should, in turn, be achieved not just semantically but also pragmatically<sup>174</sup>.

Admittedly, there seems to be a consensus readily accepted by scholars that legal language, as a form of specialized language, deserves special treatment because the language of the law is peculiar and the setting of the law (either in the legislative, juridical or judicial sense) is both rigid and frigid, and, hence, legal translation is a one-of-its kind translation genre. In addition, much as the natural gap between languages matters, the complexity involved in legal translation actually has just as much to do with the structural differences between the legal systems involved as with the structural differences between the two languages (Ibid. 2). Indeed, the correspondence between and equivalence of legal concepts between legal systems is not always as straightforward as it seems, even if both legal systems belong to the same legal tradition (say, the French and the German), despite the universal use of the terms *legal transplantation* and *legal graft* in comparative law scholarship (Langer 2004: 5). In all fairness, as if legal translation in general were not complex enough, the “bringing across”<sup>175</sup> of a Japanese legal term (say, *bukken* “物権”, a calque of the German term *Sachenrecht*) into the common law world and being turned into English will result in a high degree of ambiguity and vagueness (not even “property right” will do), and thus, any legal translation involving the language pair of Japanese and English will require sensitivity to

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<sup>174</sup> The word *pragmatic* here is used as an adjective denoting ‘relating to the linguistic branch of pragmatics’.

<sup>175</sup> This is a wordplay on the Russian term for “translation”: *переводить*, which, etymologically, means “to bring across”.



differences, both structural and conceptual, in the civil law tradition and the common law tradition, as well as irreconcilable complications arising from the untranslatability between the English language and the Japanese language (Merryman *et al.* 40). This will, in the worst case scenario, open up a Pandora's box of uncompromising and burning problems that touch on not just language but also culture and law, and hence my belief that the complexity involves both the structural gap between languages and that between legal systems. Of course, as some legal translation theorists have confirmed, the complexity will be less significant if no change in legal tradition/system is involved, as was demonstrated by the largely unproblematic cases of legal translation between Danish and Norwegian, and that between Finnish and Swedish—both official languages of Finland—despite the inherent structural differences between the two languages in the pair involved in either case (Galdia 2).

Another factor that has some bearing on legal translation is context, or, specifically, the contexts of the two legal systems/traditions involved. Essentially, the change in context complicates things for the legal translator, but, apparently, this has not received sufficient attention. As anthropologists point out, no focal event, be it a narrative or text (this includes a legal text), can be fully understood, interpreted and described in a “relevant fashion” unless one looks beyond the event itself and at the context (e.g., the cultural setting, speech situation, chronology, shared background and implicature...etc) that must have given rise to the event in the first place (emphasis mine) (Duranti and Goodwin 3). Apparently, a legal document is text and an event that must have come into being in a specific context, and, as such, it would be extremely difficult for the legal translator to repeat or replicate that context, which could have been ages ago and halfway around the world away, while he is in the middle of rendering an appropriate and faithful translation—in the target language at the translator's time and for the target audience. In other words, the *contextualization* of a legal text/document would be extremely difficult, if not impossible, and this, admittedly, must be a contributing factor to the complex nature of legal translation.

By the way, Galdia does point out a key concept from private international law that closely resembles the process of translation, and that is qualification. Here, qualification denotes the procedure of determining which country's law is to prevail and determine the meaning

of the above terms, and a theory entitled "theory of qualifications" has been developed by conflict of laws scholars such as Lorenzen (Galdia 3). The structural similarity between translation and the process of qualification in private international law is obvious. Initial discussions of this question in the conflict of laws also pointed to the fundamental impossibility of qualification. The mere fact that the qualification of legal terms regularly takes place outside the static classification process already runs counter to the fundamental impossibility of qualification. Of course, due to space constraints herein, this interesting subject would probably be best left for another research project.

In any case, luckily, translators have no trouble understanding and accepting the difficulty and complexity inherent in legal translation, and there seems to be a near-consensus across the legal translation community that legal translation is complex—possibly even more complex than any other type of specialized translation (de Groot 796). Arguably, there is, for the most part, no jargon in jurisprudence with worldwide acceptance, and this is not just because of the current lack of a “world law”, a legal order with universal applicability and jurisdiction that transcends all national borders. Legal terms are strictly bound to a legal system that is made up of various legal institutions and procedures, and because of such difference, there can be no universal legal terminology across jurisdictions. Because legal terminology is closely associated with a specific legal system, translating a legal text will be more complex than translating other text types, not to mention the risk of missing the legal effects involved. Truth be told, if even the terms *butter* and *burro* (Italian for “butter”)—two terms for a very identifiable day-to-day product—are not always guaranteed to be fully interchangeable (the function and the value implied by the objects *butter* and *burro* in their respective cultural contexts are slightly different), as claimed by Bassnett (Bassnett 26), then how could one possibly expect the term *Ehe* in German to fully represent *marriage* in English, in which the practice of common law marriage exists, or expect there to be an equivalent in the Italian language for the common law term *fee simple*? More to the point, the search for an “equivalent” in cases like these requires the translator to look beyond the *butter-burro* translation, which may appear straightforward and intuitive at one level, and to take into account the specific context at a micro level, as well as the unique and separate reality each language represents at a macro level (Ibid. 27).

Moreover, to make matters even worse, the inherent—and often unsurmountable—differences that exist between common law and civil law have a bearing on this too. As elaborated previously in this paper, the legal scholar from the civil law tradition occupies a somewhat dogmatic position in that he is expected to do the basic thinking for the legal system, which, in turn, will make a contribution to legal science by getting published (Merryman 80). In contrast, common law operates and flourishes in a totally different way with law professors and the doctrines they develop not given as much weight and with precedents having priority over scholarly dogmas. This would pose yet another challenge to cross-tradition legal translation. For his part, the legal translator needs to determine what the use of the term (or any lexical unit) (say, “heir apparent”) in its particular context, and this should include the sentence in which the term appears, the structural relation of that sentence to other neighboring sentences and the overall cultural and psychological contextual environment of the occurrence of the term (Bassnett 27). Obviously, this can prove to be quite a challenge when translating a common law term (say, again, “heir apparent”) into civil law terminology in French or German.

Worth mentioning here is Saussurean linguistics on signs, an enterprise based on structuralism and functionalism. Perhaps Saussure’s take on signs and language, which is based on the assumption that language is but a system of signs, can be of a source of inspiration for us here. He was quite possibly the first person ever to discover and theorize the arbitrary nature of language via comparison of language with other social institutions like morality, customs and law (Saussure 75). Here, “arbitrary” simply denotes the lack of any “natural” connection between object and subject. He even claimed that it is precisely this arbitrariness of language that singles it out from all other social institutions (Ibid. 76). Two of the most important tenets of his theory are the linear nature of the signifier and the arbitrary nature of the sign, both of which require some elaboration despite their apparent simplicity.

In specific terms, according to Saussure, the sign—the linguistic sign—(say, “tree” or “appeal”) is arbitrary because the link between the *signifié* and the *signifiant* is arbitrary (Why call the thing that grows out of the earth a “tree” or an “arbre” in the first place? True, it must be called *something*, but why not, say, “fruit” or “car”? There is (usually) no

identifiable reason for it.) And if the same thing can be referred to with so different terms across a spectrum of languages, then this can only mean that the link between the *signifié* and the *signifiant* is truly arbitrary, and since everything that results from the association of the *signifié* (concept) with the *signifiant* (sound image) is an element of the sign itself, Saussure believed that the sign is arbitrary (Saussure 67). Essentially, at the core of a linguistic sign (be it “tree” or “appeal”) lies the structural relationship between the *signifié* and the *signifiant*. By the way, while the *signifiant* is auditory in nature, it would be a huge mistake to simply think of the sound image as the sign, for the sound image alone (either written or spoken) would mean little if it were not associated with a concept, since all signs, just like all conventions, are all based on some collective and tacit understanding, and the arbitrariness involved is actually a good thing.

To begin with, a name (or a word) is a linguistic sign entrusted with a double entity: one vocal and one psychological (Ibid. 65). This apparently contradicts the common understanding of language among the lay public that language is intuitively but a mechanical naming process. Essentially, what the linguistic sign actually links together is a concept and a sound image<sup>176</sup>; it does not link together a thing and a name, as so many people prefer to think (Ibid. 66). Alternatively, we can also put it this way: the structural relationship between the *signifié* (i.e., the innate concept of a tree or a tort) and the *signifiant* (i.e., the sound image produced by the term “tree” or “tort”) constitutes the linguistic signs *tree* and *tort*. Since language is perceived (by Saussure) as a system of interdependent relations, the terms “tree” and “tort” operate as nouns—true—but they do so in a particular structural relationship. Saussure also believed that words and terms of all human languages (apart from sign languages, presumably) are mostly sound images, and the linguistic sign is essentially a two-sided psychological entity (Saussure 66).

So, what does Saussure’s proposition on linguistic sign and its two components, *signifié* and *signifiant*, mean for legal translation? Well, in short, assuming that, as Saussure asserted, all legal terms are linguistic signs that come with a dual psychological element (concept and sound) that are mutually supporting, then what we should look for when seeking the equivalent of a legal term (or any segment of legal significance) is primarily the

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<sup>176</sup> It should be *sound-image* as featured in the translation text and *image acoustique* as presented in original text by Saussure, but I prefer to do away with the hyphen.

*signifié* (i.e., the concept of reference) of a sign, bearing in mind that while the link between the *signifié* and the *signifiant* may be arbitrary, in no way does it suggest that the choice of sign is left entirely to the individual; instead, a sign, once established amongst members of a community, cannot be altered freely by any particular language user (Saussure 69). Thus, in short, what the legal translator must look for in a legal term (i.e., sign) should be what its concept in the background (i.e., *signifié*) is, and if and when there is sufficient information to conclude that the *signifié* in the source legal language is “equivalent” to the *signifié* in the target legal language, then the legal translator would be in a position to establish the link by calling them equivalents. Of course, again, this process, simple as it seems, is subject to specific applicable contexts (i.e., the horizontal relations) as well as the broader reality that the language represents and dictates (i.e., the vertical relations) (Bassnett 26).<sup>177</sup>

All in all, in my opinion, the problems specific to legal translation, such as the rendering of the title/name of a (non-)existent legal phenomenon or a legal institution (eg. *Zumutbarkeit* into English and *reasonable doubt* into German?) for a maximum degree of equivalence (in terms of legal effect) and acceptability, are probably best dealt with by means of economic methodology alongside sociological methodology (Say, will calquing, loanword or zero translation work best for this phrase? How do we know? Simple, just compile and calculate the benefits/profits/utility for all possible candidates and we will find out). Of course, for legal translation, the strategy employed by the legal translator varies by text type, as with any genre of translation. Šarčević proposes dividing legal texts into three broad categories according to their language function, and these include primarily prescriptive texts, legal texts that are primarily descriptive but also prescriptive and those that are purely descriptive (Šarčević 11), adding that translation of specific provisions must be done for the purpose of more insight into the legal culture/system of the source text such that the target text would

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<sup>177</sup> This is, in fact, yet another reason why Saussurean linguists do not believe that true equivalents exist across different languages, since it would be close to impossible for any two terms to entail the same set of horizontal relations and vertical relations. For instance, even though *pain* and *bread* seem to be “equivalents” of each other, and even if they seem to refer to the same referent at one level, they do not represent the same associative relations within their respective language system as a whole. While *bread* in English presents a hint on human livelihood (as in “bread-and-butter issues”), *pain* invokes something romantic that goes beyond the food’s capability of satiating people’s hunger in French, which in most cases would invoke a image of a baguette for a native French speaker. This completes two different sets of vertical relations for the two seemingly “equivalent” terms. The same thing could probably be said of synonyms (say, *pail* and *bucket*) within the same language—but to a lesser extent.

lead to the same legal effects in practice (Šarčević 2000: 71). By some accounts, specialised legal terminology and a unique concept system along with an eccentric presentation style in both target and source languages are what poses the gravest challenges for a legal translator (Simonna s 93).

In this sense, therefore, law, or, more specifically, comparative law, is a venue where two cultures meet and clash, and while every encounter inevitably involves a *self* and an *other* (though roles may be volatile and interchangeable), it will always be unique. Apparently, then, comparative law should be considered more than a hermeneutics of law, which is the position taken by scholars skeptical of the status of comparative law within law. How do we make up our mind about which legal term in English is equal to which legal term in French? Yes, both comparative law and legal hermeneutics can provide some assistance and inspiration, but do they make use of values that are quantifiable? Perhaps another perspective is worth a look. Perhaps the mirror image of the economic value of equilibrium should rightfully be equivalence in the field of translation studies, but could it all be little more than an old idea in a new guise?

In Canada, a country where bijuralism and bilingualism peacefully mingle and flourish, what happens when the two language versions are different or even mutually contradictory? Indeed, there have been cases where both the English version and the French version, while clear, are mutually incompatible, and in response, the Supreme Court of Canada would select the one that best reflects legislative intent in accordance with ordinary interpretation rules (Bastarache in G  mar & Kasirer 116), and over the years, in the face of such a dilemma, there have been cases where the English version prevailed and there have also been cases where the French version prevailed. In addition, where only one version requires interpretation, there seems to be a rule of “harmonization” at play, a rule by which whenever a law in either language requires interpretation, such interpretation should, for the sake of harmonization, be made in the light of the other language version to the fullest extent possible (Ibid.).

How do we resolve the deep-rooted issues facing the legal translator who is trying to strike a fine balance between the two legal traditions? Yes, economics might be of some

assistance, but how does it work? I would now like to propose a total of eight economic loci/concepts that may act as sources of inspiration in the following subchapter.

### **C. Possible Fronts (Paradigms) for an Economic Turn of Legal Translation**

We will now take a look at some economic loci and see how they relate to legal translation, each forming a possible front for the economic turn. Of course, some of them might be interrelated to and/or interdependent on each other (such as asymmetry of information and risk), and I trust that my readers will be able to judge for themselves when and why this happens.

#### **1. Translation as a Decision/Choice Process**

Whether we realize it or not, choices are everywhere in our lives, and we have to make them to survive. “Translators must make choices” claim Tymoczko and Gentzler (Tymoczko and Gentzler xviii). Choice theorist Eduardo Porter emphatically asserts that every choice people make is shaped by the relative costs required measured up against the potential benefits it will bring about as they are perceived (Porter 3). Existence, at least human existence, is defined by the choices people make (Schwartz 42). In this regard, first and foremost, we cannot leave out the influential translation theorist Jiří Levý, whose attempt at making translation a decision process via game theory in his landmark paper *Translation as a Decision Process* arguably made him a pioneer in an economic analysis of translation in a way. However, as I mentioned previously, because of his incomplete understanding of game theory, he was wrong to have suggested that translation is a game simply because it is a decision process. In fact, my readers should be able to understand by now that a game involves strategic behaviour among players when several players are on the “acting scene” who are endeavoring to get the upper hand of their rivals. This is one of the most pivotal points I am trying to make. In any case, in our common ground is the belief that translation is a lengthy process made up of countless decisions and choices, to which this front/trajectory purports.

Translation theorists seem ready to accept the position that translation is a decision process on the part of the translator, and this has great implications for my research. As a case in

point, Annie Brisset revealed subtly that translation is governed by norms, which translators have to follow consciously or subconsciously, in order to make the source text, which is basically a discourse, acceptable for the target culture (Brisset 1996), and as another case in point, Bercea claims that creative choices on the part of the translator must be made in order to guarantee the production of a “fully intelligible textual product” (emphasis mine) (Bercea in Glanert 140). In addition, Theo Hermans, by virtue of a semi-fictitious example, questioned the possibility of rendering the South African term *kaffir*, which used to be a common term for people of the black race during the apartheid era, into something acceptable today (Hermans in Munday 93). In regard to this, there may have been several options, including zero translation (original but in italics), glossing, suppressing it and replacing it with another term, each with its specific pros and cons (Ibid.). No matter the result, one thing is for sure: translation is a decision process with the translator as the decision maker constantly “calling the shots” for the sake of a judicious decision on the spot as well as in the long run. Many theorists have gone one step further by calling the translator a negotiator, Umberto Eco being one of them.<sup>178</sup> This is a claim I strongly reject, as I prefer to liken him to a mediator, if not a judge.<sup>179</sup> All in all, most of all, the most vocal and straightforward with the claim that translation is a decision process was no other than Jiří Levý, a pioneer in this area who will be cited in further detail in the paragraph *Translation as a Game*.<sup>180</sup>

**Choice Theory<sup>181</sup>:** Traditionally, choice theory has been more of an area of psychology than one of economics, but it is gaining ground among economists (Reder 117). Yes, individuals are presumed rational in the sense that they will always try as hard as possible to have resources available to them allocated such that their own overall utility would be maximized. This has been established. Now, psychologists and some economists wish to

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<sup>178</sup> Original text: translation is a negotiation to such an extent that translators must also negotiate with publishers, because a translation may be more or less domesticated or foreignized according to the context in which the book is published, or the age of its expected readers (all emphases mine). *Vide* Eco 2003(b): 173.

<sup>179</sup> For details on this metaphor, please refer to my MA thesis entitled *The Mediator, the Arbitrator or the Judge?—Translation as Dispute Resolution*, University of Ottawa, 2014, pp. 144 *et seq.*

<sup>180</sup> By calling translation (or anything else for that matter) a game, one is subtly implying that it is a decision process, for a game is a situation where many decision makers come into play and interact with each other, each with his own interest and each unsure of all other players’ decisions.

<sup>181</sup> As a quick reminder, choice theory is not the same as “rational choice theory”, which is basically about the assumption of human nature, along with self-interestedness. This was mentioned near the beginning of this research. In addition, choice theory is sometimes referred to as “decision theory”.



make an argument about the behavior of individual decision makers subject to direct test (Ibid. 118). This sets the background for choice theory. Experiments and survey results sometimes cast doubt on the behavioral consistence of choice makers, along with the hypothesis of rationality to begin with (Ibid. 119).

In any case, for many, the right to choose is a very fundamental human right that should never be compromised, and the ability to choose from as many options as possible is even considered a component of personal freedom and, by inference, a component to the rule of law by some (Raz 220). Yet, despite the common belief in “More choice, more freedom, and thus more human rights”, many people are actually feeling less and less satisfied and more and more distressed as their freedom of choice expands, as studies have found. Granted, liberalism assigns great importance to personal autonomy, but, at the same time, too much liberty may end up killing that autonomy. People often fail to realize that with choice comes stress. While it is true that most people find it regrettable to pass up a sweet opportunity to choose, at the same time, in most cases, people realize that they are not as satisfied with their choice as they were expecting—sometimes not even close—even if they do get “what they asked for” (Schwartz 221). The truth is, much as people, on the whole, would prefer to have as much as possible of everything they are pursuing (this includes life, health, wealth, love, fame...), no one could ever have enough of everything, and they must therefore learn how to make and accept trade-offs, as nothing—not even one’s own life—is indefinitely and unconditionally valuable (Friedman 1996: 16). Not to mention that as people get more of what they hope for, each additional unit will come with less and less satisfaction—the spirit of the law of marginal utility. Indeed, people, as consumers, as parents or as voters in elections, often have to make trade-offs between relatively fundamental values (such as life and health) and relatively minor ones (such as a liking for tobacco and alcohol), and turns out that these trade-offs are not as logical and justifiable as they first appear. No wonder Gary Becker once claimed that, at least under the economic approach, most deaths are suicides to some extent and “natural deaths” are extremely rare, since people make “unwise” decisions (such as jaywalking to save some time or having an extra fix of alcohol out of peer pressure) out of convenience or impulse every so often (Becker 1976: 10). Why do human beings cling to the belief that human life is (or *should*

*be*) priceless and incalculable while putting a rather low price on it at the same time? Is this a paradox?

The sad truth is that human life does come with a price tag, and people do in fact constantly place a price on it—as long as it is not their own life. As a matter of fact, more than a single price, human life even has a menu (Porter 41). People want to get what they desire at the right time, true, but when they do get it, they often discover that what they have always wanted does not satisfy them as much as they expected it to. Therefore, Schwartz made a summary of 11 steps to mitigate stress that comes with too much choice ranging from “choose when to choose” to “make your decisions non-reversible”, and from “practice an attitude of gratitude” to “learn to love constraints” (Schwartz 222 *et seq.*).

Let’s start with this one: “Choose when to choose” (Ibid. 222). Allow yourself only a small but fixed number of options, since the key thing most of the time is not the objective results of a decision, but the subjective impression of them (examples include no more than two stores to walk into for a pair of shoes; no more than two sources for a term that I am not familiar with). What this means for translators can be summed up as follows:

Be a chooser and not a picker (Ibid. 224): a chooser knows how to create opportunities for himself, while a picker is nothing but one who passively “follows the trend” when given an overwhelming cascade of choices. Of course, following the common and widely accepted “norms” of the day will, in some cases, lead to adverse selection, an unexpected result, which will, in turn, lead to discriminatory practices that are considered economically rational but ethically controversial nonetheless (Malloy 134). This will be briefly touched on later in this chapter but in the special paragraph on moral hazard. What this means for the legal translator is that when faced with an outlandish legal concept (e.g., “Mail Box Rule”), he would follow some industry-wide norms, customs and rules, and at the same time, he would try to create new options for himself and for future translators.

Satisfice more and maximize less (225): maximizers have unrealistic expectations that cannot be met, while satisficers learn to embrace the “good enough” out of their conscience and free will. What this means for the legal translator is no translation is ever “good enough” as there will always be some improvement that could be made to it, especially in a

subsequent non-related spatiotemporal context. For instance, in regard to the dichotomy of barrister/solicitor for legal practitioners as featured in the Irish system (along with those in many common law jurisdictions worldwide), due to the lack of an comparable dichotomy in civil law, there can be a number of possible translations for it, including *notaire*, *avocat*, *juriste*, *juriconsulte*, *conseil juridique*, *solicitor*, *barrister*...etc, each with its pros and cons. The satisficing legal translator should be ready to choose one that is appropriate for the moment without having too many second thoughts, as no single one will ever be “perfect” for everyone everywhere anyway.

Stop giving opportunity costs too much thought (Ibid. 227): thinking too much about unchosen options will distract us from the satisfaction provided by the chosen one. While opportunity cost is something to ponder when making a decision, especially a once-in-a-lifetime decision, the truth is the “second-best” option might not end up being the second-best one, or even the third-best one at all. All these rankings will always be unstable.

Make your decisions irreversible (Ibid. 228): people should try to appreciate the choice they have made and make an effort to improve it instead of wondering if they could have made a better choice, or they will be in for a “prescription for misery”. While many of us tend to prefer a “returns accepted” sale when making a purchase—especially online via e-commerce, the hard fact is hitting the RESET button and starting everything from scratch might not work in our best interest. Sometimes it would actually be better for the legal translator to make a resolute decision and accept it as is and then schedule and arrange for everything that subsequently comes up around it. The example provided by Levý regarding the English translation for the German term *Mensch* can be of some guidance here.

Learn to be grateful (Ibid. 229): This one is obvious, as it will improve our subjective experience with every choice we make. The legal translator should be delighted that he has made a call on one difficult translation decision and start to tip the balance in favor of the *fait accompli* by looking at it on the “bright side”.

Try to regret less and complain less (Ibid. 231): regret can be mitigated, and rarely does any one single decision, in and of itself, have the life-changing power we imagine. Even if the legal translator realized that he has previously made a “wrong” decision, the decision must

have made for a variety of intertwining reasons that defined who the translator was as a translator—and as a human being. True, in some cases, a mistranslation may produce unintended consequences, as we have seen in some court cases and in some diplomatic venues, and we should always learn hard from our mistakes. But changing one mistake (Is “lawyer” or “attorney” better in the case at hand?) made at a certain point will probably not have altered the personality and the character of the translator, or even his mastery of translation theory and practice.

Anticipate adaptation (Ibid. 232): people just get used to things over time, and sensations seldom last forever. According to psychologists and animal behaviour scientists, human beings are so resilient to changes in life that it seems like a mechanism programmed into their brains. Indeed, this evolutionarily adaptive trait featured in human nature helps human beings make it through the hardest of times in life. Good things will not feel as good in a month’s time, and now will bad things feel as bad in a month’s time.

Control expectations (Ibid. 233): people should not let their expectations about their decisions run too high. Our perception and understanding of a thing depends on the point of reference we adopt for the comparison. If we have a benchmark like a maximizer’s, then we will be less and less satisfied as the adaptation process begins—with or without our approval. What this means for the legal translator is, again, while it is understandable for have expectations for every choice we make, our choices will not always be given their full potential. Instead, we should channel the robust energy we have for our choices to more productive means that will help us with our next translation decision, which might turn out just as momentous and difficult. The thrill of unexpected pleasure stumbled upon by accident can potentially make the most commonplace things in translation (say, *aimer* for to “like” on Facebook, or...wait...better yet...*liker* and also *liké*...as being used by many Generation Y youngsters.)

Curtail social comparison (Ibid. 234): Acknowledge that the grass is not necessarily greener on the other side of the fence; if it looks that way, then perhaps we are looking at it from the wrong angle. Social comparison and peer pressure often go hand in hand, and usually for the wrong reasons. The EU’s legal translation for refugees and asylum seekers is not inferior to that administered by the United Nations.

Learn to appreciate constraints (Ibid. 235): Do not let our long cherished freedom of choice become a “tyranny of choice”. Instead, we should learn to appreciate rules and limits as liberating and convenient things that help us avoid having to repeatedly make deliberate decisions. I believe that this one has a special bearing on translators in the sense that it somewhat overlaps the sociological perspective on translation. Norms should be viewed in a positive light since they did not happen out of the blue; they, instead, most likely reflect the experiences passed down to us by our forefathers that were derived from countless trials and errors on their part. Having to follow a predetermined path left behind by our predecessors may appear demeaning and submissive to some, but, on the flip side, one gets to explore many opportunities without having to worry about basic survival. The trade-off might well be worth it. I think that this, in fact, weighs on us the most. Term banks exist for the obvious purpose of uniformity and convenience, and thus they should not be viewed as a constraint on the freedom and latitude that legal translators deserve in their line of work.

On a final note, as choice theorist Barry Schwartz so rightfully points out close to the end of his book, the rule “choice within constraints, freedom within limits” is what forces people to conjure up many marvelous opportunities (Schwartz 236). For the translator, too wide a range of possible translation options (e.g., the term *sex discrimination* may be rendered as “discrimination sexuelle”, “discrimination fondée sur le sexe”, “discrimination selon le sexe”, “discrimination par le sexe” or “discrimination de genre”, or even “sexisme”...<sup>182</sup>), making the downside of abundant choice rather obvious. Trade-offs are psychologically trying and exhausting, and the last thing a translator would want is trade-offs after trade-offs that all come with some accompanying consequences that are also unpredictable and risky at the same time.

What does this mean for translation? Or, in Hermans’ own words, “what concerns can economics, or simply choice theory, inject into translation studies” (Hermans in Munday 93)? First off, making choices presupposes the possibility of choice, and then agency, values and accountability (Ibid.). While this view points to an end to the age-old practice of simple alignment of original and translation for the sake of equivalence, as well as the

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<sup>182</sup> All these terms in French are listed as equivalents of the term *sex discrimination* in the Canadian term bank Termium Plus, though with different degrees of popularity and currency, as indicated by different labels within the same term record.

beginning of the serious practice of the contextualization of translation, it does mean extra burden for the legal translator in the sense that he will have to face up to an overwhelmingly high amount of choices, each of which with its pros and cons, inundated in endless regret, depression and disappointment, especially if he happens to be a maximizer. When the legal translator is handling a legal term like “plead guilty at trial”, he may have different possible choices (like *plaider coupable à son procès* and *plaider coupable devant le tribunal*) to choose from, and his choice will likely be made in the light of his own cultural, ideological and ethnic affiliations. The translator being vested with the power to choose, his final choice will not only reflect his own values, it will also entail accountability. This, as shown by Barry Schwartz in his popular book, will not be as simple as it sounds.

Let us run a simple and hypothetical example of our cost accounting. True, under the utilitarian view, people should be allowed to enter into whatever contractual exchange with whomever out of their freewill for their mutual benefit, and, on top of that, everyone should be allowed to decide for themselves how preferable any particular choice is, all other things considered, to all other alternatives. The truth is, in the course of a decision, there will have to be trade-offs, give-and-takes and sacrifices, and as a result, there will be regrets, not to mention the confusion and fear that comes with an overwhelming range of different choices and the compromises to be made with those choices. In addition, there will be opportunity costs, which is the cost incurred when passing up an alternative. For example, back to the previous example, let’s say that the legal translator decides to go with the term *discrimination sexuelle*. In doing so, he passes up the chance to use, say, *discrimination selon le sexe*, which happens to be the next best choice for him, and so the opportunity cost to him should be whatever utility he could have derived from the latter translation—no more and no less. He should not look any further, or else it would defeat the entire purpose of determining the opportunity cost altogether. Moreover, since, according to Schwartz, human beings have the subconscious tendency of looking at an option (in fact, almost everything) in terms of its features—especially defining features—instead of seeing it as a whole (Schwartz 122), it would be fairly difficult for opportunity costs to be accurately calculated. As a result, the more potential translation alternatives there are for the legal translator to choose from, the harder it would be for him to say for sure which option is the

second-best and, thus, the more volatile and intangible the opportunity costs will appear to him and, in turn, the less satisfaction he will get from the translation choice he actually makes.

## 2. Risk

Every human action comes with (at least) some risk; whether we are crossing the street to get to the other side or just getting paid for a task we have completed, we are constantly confronted with risk that may be unknown to us. It is practically everywhere, and no-risk activities are virtually non-existent, which is why lawyers and business entrepreneurs are trained to manage risk and its relationship with return (price) in every transaction. To make matters worse, not all risks can be eliminated—or even predicted, and some of them cannot even be alleviated with adequate information. On a more professional level, one who performs a task or a mission risks failure, and such failure will definitely cost him anything from his job to his freedom. That being the case, our real question then is whether the risk is detrimental or beneficial, the likelihood of it and who is bearing the consequences, good or bad, of the risk, and these are all the factors that determine whether the risk is worth taking. Of course, how people, who are assumed to be rational and self-interested, act and react in relation to risk can vary greatly by age, gender, upbringing, educational background, among many other factors.

By definition, risk entails something unknown and probably unforeseeable. Quite understandably, human beings, who are practically creatures made of flesh and blood, tend to be afraid of the unknown; it is a congenital thing that is hardwired into their personality and maybe also their cognitive faculty. Yet at the same time, there could have been no human civilization on Earth without risk and without our ancestors who were ready to take the risk in exchange for some benefit. Legal translator-lawyer Thomas Mann argues in his article that in the real world, legal translators, who constantly work under great pressure because of their clients' high expectation and mediocre respect for them, are sometimes stricken with tort claims and breach of contract claims on the basis of negligence or breach of duty of care (Mann 9-10). By now, one should be able to understand why scholars insist

that translation, especially at an international organization like the UN, is risky business (Kelly and Zetzsche: 53). Anthony Pym suggests very implicitly in his work *Translating as Risk Management*, which will be cited extensively later in this chapter, that risk has the capacity of presenting human beings with valuable opportunities that make them want to work with each other (Pym 2015: 71). And, for that matter, risk, in the loosest sense, refers to the fact that the final results of an action, while not certain, may take more than one value. And in this regard, when it comes to beneficial choice making, people, on the whole, seem to prefer a small and yet certain gain to a larger but uncertain one when confronted with a choice among several alternatives that involve different amounts of risk or uncertainty (Ask yourself this: Would you like a 50% chance of being paid nothing and a 50% chance of being paid 100K by your employer, giving you an expectation (or expected value<sup>183</sup>) of 50K, or would you rather have a fixed salary of 50K?). And, further, if you would rather have less than the expected value of 50K (let's say, a modest 40K) than the aforementioned "gamble" with your salary, then you can be said to be *risk-adverse*, which most people are, especially in regard to higher stakes.

In terms of attitude towards risk (i.e., "risk preference" or "risk aversion" depending on the individual), there are three types of human beings: risk-adverse, risk-preferring and risk-neutral. Intuitive as it may seem, risk-adverse does not simply mean "having a distaste for risks", and risk-preferring does not simply mean "having a liking for risks" either. There is more to it. Risk preference is actually a barometer as to how the value of money<sup>184</sup> to a person varies with the amount of it he has (Friedman 2000: 65). In other words, our assessment of risk cannot be decoupled from our expectation of a return, and vice versa, and this forms the foundation of a cost-and-benefit analysis (Malloy 169). While, initially, the assumption of risk neutrality may look like an enticing one to make when considering many issues, legal or translational, it is, alas, a very unrealistic one to make, especially for situations where a great deal is at stake, like in regard to consumer product liability (Polinsky 118). Moreover, as many ordinary citizens are aware, risk and return relate to

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<sup>183</sup> Both these terms are acceptable and frequently used interchangeably in statistics scholarship, and they are known to refer to the same idea—just by different scholars.

<sup>184</sup> By the way, it does not have to be money that is at stake; it could be any interest or benefit imaginable. Friedman is limiting it all to money apparently out of simplicity concerns, knowing that, for him, almost anything can be expressed in money terms.



each other in opposite directions, or, in more mathematical terms, are in a *negative* correlation, and hence the more risk is assigned to a translator for his service (say, translating a politically sensitive prospectus), then the higher the compensation he will request. The sale of “as is” items in a store would be another significant example, in which case the risk gets shifted to the buyer in exchange for a lower sale price. By the way, there are two broad categories of risk: temporal risk and transactional risk (Malloy 169).

While translation theorists today welcome the idea that translation is a socio-economic activity, what they still seem to have failed to face up to is the fact that, as with all human activities, translation comes with its risks too. How so? For one thing, given the perception of translators among the general public, translators sometimes find it hard to distance themselves (or to be distanced by the target readership) from the content of the source text. To this, Theo Hermans provided a very real and bone-chilling example. In *Translation, Ethics, Politics*, he talked about how Günter Deckert provided simultaneous English-German interpretation for a talk given by Frederic Leuchter, in which he “accidentally denied” the Holocaust (Hermans in Munday 93). One can only imagine how harsh and bitter a backlash the translator (interpreter) must have been subjected to by the audience. He then went on to raise a rhetorical question, which I find very thought-provoking: What about the work *The Satanic Verses* by Salman Rushdie then? Was it appropriate for Muslims to declare a jihad in the form of a fatwa on him and his work for blasphemy (Ibid.)? If so, then does this mean that the Japanese Islam scholar and Tsukuba University professor Hitoshi Igarashi, who worked on the Japanese translation of this work of Rushdie’s, had himself to blame for his own murder? Apparently, these questions, while categorized as ethical ones by Hermans, also touch on the subject of risk in its most primitive form for translators. Also, legal translators—particularly courtroom interpreters, while expected to render something with legal effects but granted only very limited power to react or counteract, are typically vulnerable to an enormous amount of risk, which makes legal translation all the more complex and challenging.<sup>185</sup> This presumably—and paradoxically—defies the common return on investment rule of “High risk high return”, as

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<sup>185</sup> Courtroom interpreters in charge of simultaneous interpretation at the Nuremburg Trial may vouch (or may have vouched) for this. There were countless examples where inaccuracies in the German-to-English translation nearly “turned the tide” and yielded devastating effects but only to be spotted by the sharp eyes of Hermann Goring, one of the defendants on trial. For details, see Gaiba, 1998, pp. 108-109.

legal translators, who are expected to be knowledgeable in several areas, are usually not paid any more than their counterparts in, say, literary translation, not to mention that translators in general are not paid more compensation or respect than authors/writers are. Roughly the same thing can be said of community interpreters who work for disadvantaged classes like first-generation immigrants who barely speak the local language; they often find themselves in situations like a police interrogation or a licensing authority interview where their identities are revealed and what they say—or suppress—can have life-changing effects for their “clients”.

Anthony Pym has a great deal to say about risk insofar as it concerns translation. In his paper *Translating as Risk Management*, he identifies three basic types of risks. The first type of risk is the likelihood of losing a translation-specific kind of credibility, and as it concerns relations between people and can be called “credibility risk” (Pym 2015: 67). The second kind of risk arises from the translator’s uncertainty when making a decision on how to render an item in another human language, and it involves cognitive processes and should thus be called ‘uncertainty risk’ (Ibid.). Finally, the third kind of risk, then, has to do with the way texts are interpreted and used in contexts, where some elements are high-risk because they are keys to communication success, while others are, relatively speaking, low-risk; this type of risk applies to the different parts of a text and can be called ‘communicative risk’ (Ibid.). According to Pym, if these three types of risks, which are newly identified, are dealt with properly, then translation studies might well be able to go one step further by bypassing the age-long frigidity about equivalence and fidelity thereby providing a new perspective on ethics and training (Ibid.). Now, what exactly are the alleged risks? The first risk has to do with the indeterminacy of translation. On a more day-to-day level, Pym argues, first and foremost, it is a risk of loss or failure: when you perform a high-risk action, true, you may be embarking on a gravy train, but, in all fairness, you could just as well lose your money, your clients, your job or even all of the above at once, and in a more translation-specific context, it is the credibility risk, which refers to the risk of losing trust, or, more emphatically, losing credibility (Ibid. 69). In other words, the credibility risk is an embodiment of the make-or-break mission for the translator. In essence, this risk refers to the “illusion” that the translator is but a “middleman” and not the “real” author, since the translator is expected to convey the author’s message without

fabricating anything, and once the translator assumes (or is believed to have assumed) the seat of the author, the text will no longer be just a translation. This risk is obvious for career legal translators, and it may have a ripple effect that goes way beyond the translation community, and not just because legal translators need good reputation to survive.

Then comes the second risk proposed by Pym, and that is the uncertainty risk. Simple as it sounds, this risk centers on the indecision regarding the comprehension, transfer and/or production of the text. Because of this potential type of risk, some translators who have more experience under their belt would, according to Pym, go as far as to leave a traceable mark through enhanced visibility, thereby effectively transferring some of the risk over to the author (Ibid. 70-71). Finally, before discussing the third type of risk, Pym concedes that many creative translation devices (such as transposition) are actually devices of risk-taking that should be encouraged and rewarded (Ibid. 71).

The third type of risk is what Pym calls “communicative risk”, which apparently refers to the risk of making a mistake or having a misunderstanding in translation (Ibid.) To me, however, this does not appear to be a true “risk” at all; it appears to concern the weight and distribution of different risks that exist (and co-exist) in one translation project. In any case, Pym does concede that, from a purely cost-efficiency vantage point, the fact that professional interpreters are used only in situations where high risk and high opportunity costs<sup>186</sup> of subpar translation are involved explains the prevalence of communicative risk throughout the translation industry (Ibid. 72).

Pym, through some examples, some fictitious some less so, illustrates how the degree of risk plays out in connection to the strategy adopted by the translator, and what the compelling forces may be for a translator to adopt a certain strategy (say, literalism instead of citation) (Ibid. 73). As a quick example, Pym postulates that a “one-size-fits-all” strategy of literalism on the part of translators at certain moments may serve as evidence that many translators are risk-averse in that they would rather “play it safe” by going with literalism and avoiding the pangs of conscience than face up to a “gamble” with a presumably

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<sup>186</sup> Instead of “opportunity cost”, Pym uses the noun phrase “cost for alternatives to translation” (Pym 2015: 72), which is practically a rough outline of the economic concept of *opportunity cost*. Further, nowhere in this paper of his is there any mention of this term either. Apparently, he, who is not a career economist himself, might not have been aware of this very key economic term.

“better” strategy (say, calquing) which might bring about an equal chance of pleasing and winning the audience and offending and losing the audience at the same time (Ibid.). Despite the apparent lack of figures or models of quantification throughout his paper, this position of Pym’s does weigh on me.

In addition, Pym proposed an ingenious way to introduce his three risks into the context of translation without either renouncing or subscribing to the “gold axiom” of equivalence. His first risk concerns people, typically author—translator—target reader, and this is supposed to distinguish translation from other speech events (Pym 2015: 69). Of course, a shared cultural background among these actors/parties will help reduce the risk of misunderstandings, betrayals and non-cooperation. While he implicitly indicates the risks created by uncertainties entailed by the translation event, he seems to have failed to point out that, at least in conventional economic thinking, higher risk is supposed to be accompanied by higher return<sup>187</sup>, and this is not always true for translators. Risk, as he acknowledges, is a cultural category, which can—and should—be incorporated into economic models in the form of mathematics (Ibid. 74). In the end, while complimenting on the many elaborate ways translators seek to manage, avoid and even weather risk, Pym does lament the conspicuous lack of economically rigorous models of risk being introduced and tested in reference to more substantial data from real-life case studies of translation (Ibid. 75).

At a minimum, economic efficiency-wise, it makes perfect sense to allocate risks to whichever party that can control the risk or insure against it more economically (i.e., cheaply) (Harrison 94). Ideally, as well, risk should be assessed and allocated on the basis of socio-economic factors like gender, race, age, educational background and occupation, among others, even though this is not always easy (Malloy 172). Any mishandling of a risk can result in opportunistic behavior<sup>188</sup> on the part of the party that has the upper hand in regard to the risk (Ibid. 175). This rule holds just as true for translation, and probably even more so for legal translation, which is far from a risk-free activity. It comes with its

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<sup>187</sup> Pym, apparently, prefers the term *gain* instead of “return”, the latter being a term widely used in commerce and business.

<sup>188</sup> Opportunistic behavior categorically includes any behavior, usually unilateral and without the consent from any other party that might be affected by said behavior, that evidences a move or action to seek out better returns from an exchange.

inherent risks such as misinformation on the part of a translator who is not bicultural and bilingual enough, and the risk of misunderstanding the legal document or the witness testimony either because of a technical problem (such as inadequate audio-video facilities), logistics (electrical transmission system failure) and language problems (e.g., unusual grammar, special writing style...). This emerged for the first time in modern history in the Nuremberg Trial, when repeated mock trials were held specifically for the guarantee of smooth functioning of all hardware (Gaiba 77). Turning to a more “modern” example, it has been confirmed by empirical data compiled by experts that in Iraq, since the days of the Gulf War, interpreters have been ten times more likely to be killed than US troops (Kelly and Zetzsche: 39). The same thing could be said of written translation (paper-based or web-based) too, where editing and proofreading may sometimes leave out mistakes and typos that can subsequently prove very substantial. Also, there will always be politics looming in the background, which may urge the translator to self-censor, and censorship (whatever the form) will always remain a very real source of risk for adverse selection, a practice that will be covered in more detail later on in this chapter. By the way, an event of courtroom interpreting like in the Nuremberg trial would, of course, be considered a high-risk translation activity.

All in all, evidence shows that translators, as rational and self-interested human beings made of flesh and blood, not only distribute time and effort in accordance with the intensity of the risk and the potential benefits the risk carries, but also that they seem risk-averse as a professional group (Pym 77). True, like I have been reiterating all along, translators are profit seekers who will engage in compromise and trade-offs as long as they are confident that in doing so they are doing themselves the “biggest favor possible”. Needless to say, our discourse on risk has a great bearing on another topic: moral hazard and also, to a lesser extent, the asymmetry of information, both of which will be covered later in this chapter in connection to legal translation.

### 3. Translation as a Game

Invented by John von Neumann in the 1940s and further refined by the ingenious mathematician John Nash, game theory has become a legendary framework and paradigm

that has seen extensive application in a number of areas, including but not limited to economics, psychology and law. In the simplest sense, a game is any situation where two or more decision makers, being well aware that their decisions would be strategically interdependent, make decisions that will have an impact on one another (Gravelle & Rees 346), and, in the plainest terms, game theory studies the result of stylized games where two individuals (oftentimes more) choose their actions while recognizing the importance of all other players' choices (Georgakopoulos 51). Admittedly, as avid mathematics claim, many, if not all, life situations can be viewed as games if the term is interpreted "broadly enough" (Paulos 91). Basically, for legal research and for my research, there are two types of games of significant relevance: the cooperation game and the coordination game (Ibid.). When game theory was first postulated, it was meant to be a mathematical theory that would be in a position to describe what choices a rational person would make and, given the rules of the game, what those choices would possibly entail. Moreover, game theory, as intended by von Neumann, was supposed to cover not only games in the conventional sense, but also economics, crime, diplomacy and political activities—i.e., every form of human interaction that involves strategic behavior (Friedman 2000: 85). A good number of economists praise it for its capability of providing a solution for a wide range of situations as featured in the same game (Gravelle & Rees 347). As it turns out, as expected, game theory was found capable of explaining oligopoly best, competition among the few, among all market types, as only in an oligopoly is there strategic interdependence, whereby interactions and decision making among all sellers would make a significant difference (Gravelle & Rees 400). Because of the unique nature of oligopoly (conscious parallelism and intra-enterprise conspiracy being two key characteristics), the largest area of research in applied game theory today is probably the theory of oligopoly (Hylton 74-75). This, presumably, should send a strong—and yet compassionate—message to translation theorists.

The key elements of a game, by definition, include a set of players; a set of possible actions; the timing of the players' choices of actions; the payoffs for each player derived from all possible plays (scenarios) of the game; the set of strategies available to each player; the information each player possesses; the feasibility of binding commitments (Ibid. 347-348). Obviously, these are all very complex elements to analyze and master, but they are the key to what makes a game a game. Thus, typically, any situation where two actors

are in a half-cooperative and half-competitive relationship can be called a game. Another core issue to game theory is the stableness of the “agreement” or the “joint action”, as it might not hold stable for every actor forever. There are typically three types of games, each coming with a different set of key elements and also a different solution: strict dominance, Nash equilibrium and sub-game perfect equilibrium (Ibid. 348).

Despite the success he gained from game theory’s applications to economics, von Neumann was especially interested in applying game theory to politics and warfare. At one point, he even used it to model the standoff between the U.S.A. and the U.S.S.R. during the Cold War, picturing them as two players engaged in a zero-sum game. Game theory provides a common approach to formulate, structure, analyse and eventually understand different scenarios of strategy. Basically, game theory investigates conflict situations, the interaction between the agents and their decisions. A game in the sense of game theory is given by a (mostly finite) number of players, who interact with each other according to given rules, and those players might be individuals, groups, companies, associations and so on. Their interactions will have an impact on each of the players and on the whole group of players; i.e. they are interdependent. To be more precise, a game is described by a fixed number of players and all sets of strategies they may have in mind. If, in light of what one’s opponent may do, it is in one’s best interest to adopt a certain strategy, then that strategy would become the “dominant strategy”, which may or may not offer them the highest payoff as a group (Hylton 69). The most cited example in regard to game theory is the Prisoner’s Dilemma. It is also the most canonical example, in which two suspects are arrested for a crime and questioned by the prosecutor in separate cells. Each of them is advised by the prosecutor that if he confesses and his accomplice does not, he will get only 3 months and the other person 5 years, and if they both confess, then each of them will be given clemency by the judge and get 2 years. However, if neither one of them confesses, then the prosecutor will have a hard time pressing burglary charges against either of them and, in the long run, might only be able to press for a charge that carries a 6-month maximum sentence, which, of course, will not be disclosed by the prosecutor to the two suspects kept in custody. Then what happens? Of course, both suspects confess and both of them end up with two years in prison, while little did they know that had they both kept silent, they would have each ended up with only six months in prison—a much more lenient sentence. The result may

sound deeply counterintuitive, but the logic of the game as presented in the Prisoner's Dilemma is overwhelmingly persuasive and, by economists' own admission, hard to refute. Thus, crime suspects do confess for the same reasons servicemen in combat desert (Friedman 1996: 154).

However, in all fairness, game theory does not come without controversy. Some economists, while admiring it for its capability of provoking logical thinking in a fascinating way, call it a "desperation measure" that is to be employed only when all else fails (Friedman 1996: 166). A game could have anything from zero to an infinite number of possible solutions, and it, as scientists have established, cannot resolve many real-world strategic situations with clear-cut and non-obscured predictions (Friedman 2000: 85). Also, it does not always guarantee a Nash equilibrium state for a game, even though the point at which Nash equilibrium is reached (if ever) will definitely hold steady against all individual deviant actions, since a better payoff requires the cooperative and simultaneous action (or change in action) by both parties. In addition, true, game theory experts have made mostly successful but limited "if-then" predictions that work only under certain fixed rules within acceptable limits of error, and yet their observations may well have been the direct result of a set of rules exerting constraining effects on behaviour (Reder 285). Moreover, there are arguably two main challenges, neither one of which is unique to the application of game theory in law and economics. The first challenge is to fit the complexities of actual interactions to the simplified games that game theory handles (Georgakopoulos 55). The second one is to propose the rules or interpretations that can prevent the undesirable outcomes (Ibid. 56).

Now that we have a clear definition of a game, we should understand why translation as Jiří Levý understood it is not a game in the real sense. First off, a game, by definition, requires the presence of at least two players/actors whose actions/decisions have an impact on one another. They might be in a one-off game or a repeated game, but in any case, there have to be at least two parties to the game. Also, there must be some calculation going on about what the other player(s) might do next, eventually leading to a Nash equilibrium, technically a point where no one needs to modify their behaviour in anticipation of a higher



payoff, given what all other people involved are doing.<sup>189</sup> Finally, while there might never be a Nash equilibrium, there must be a set of actions (“optimal strategies”) accepted by everybody. All of this, unfortunately, is absent in Levý’s research. Instead, what he proposed actually has more to do with limited rationality, as I mentioned before. Put another way, in a multi-player repeated game<sup>190</sup>, a Nash equilibrium is the state where each player has chosen a strategy that is optimal for himself given the strategies that all other players are following (or are expected to follow). One should note, though, that while a Nash equilibrium may well hold stable against potential individual deviant action, it might not be the most desirable one (i.e., the strategy pair that offers them the greatest payoffs combined) from the perspective of the parties concerned (just recall the Prisoner’s Dilemma). In a game, only the Nash equilibrium strategy profile will have such self-enforcing power that will prevent players from changing their actions. Of course, one could easily argue that the dilemma can be resolved if the parties concerned are trustworthy and can reliably commit not to deviate, but something like this would definitely require an authority or a higher order that is in a position to impose due adverse consequences on cheating parties. To a certain extent, contract law may be capable of compelling commitment of all players (Georgakopoulos 53).

In any case, granted, Nash equilibrium is preferred as a solution to legal translation problems—at least in this research—for the sake of simplicity due to space constraints, but, more importantly, also because, once again, human behaviour is assumed rational, and a rational player is one who not only chooses the best strategy for himself but also believes that all his opponents (all other players playing for and/or against him) are choosing the best for themselves too (Gravelle & Rees 360). As one of the components of game theory, a player—any player—must form a conjecture or an expectation of how all other players will act/choose—however subjectively before calculating his own potential benefits with or without the help of a payoff matrix. Over time, players will “learn” the gist of the game, and, as a result, a Nash equilibrium will yield better predictions for them (Ibid. 361). In a

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<sup>189</sup> In other words, if at least one party can make themselves better off by unilaterally changing their behavior/strategy, then that action combination would not amount to a Nash equilibrium.

<sup>190</sup> A repeated game is simply a one-off game (or a *constituent* game) played more than once.

game, if either/any party has an incentive to deviate or to “cheat”, then the game will not have a stable outcome, and, of course, no Nash equilibrium will occur.

One notable thing that Levý attempted with his handling of the phrase *Der gute Mensch de Sezuan* in his paper *Translation as a Decision Process* was the introduction of what is referred to as a “game tree” by economists. In it, with patterns of genesis, or generative patterns, and sometimes with a group of diverging arrows, he aimed to show how the translator would arrive at one choice at the end of the paradigm. Apparently, Levý’s approach resembles the game tree approach more and more as one moves closer to the end and with fewer and fewer choices that, ironically, may require a good memory on the part of the translator (Gravelle & Rees 436-437). Moreover, once again, what Levý proposed actually coincides with bounded rationality, which, in turn, might justify the practice of benign paternalism on the part of a government or a government-like authority (Georgakopoulos 61). And one possible ramification of this as regards translation is the need for a term bank that allegedly works for the convenience of all translators (who are all subjected to bounded rationality), which may accidentally deprive them of their rights, liberties and responsibilities at the same time.

In retrospect, however hypothetically, if Levý had proposed that there is a mentally calculating and cunning game going on between the translator and the author (say, an author from a country like Bhutan whose official language Dzongkha is understood by only one translator who happens to be bilingual in Swahili, making their situation a quasi-double monopoly), or a game between the translator and the publishing house (translator and author collude or not vis-à-vis the publisher, who has censorship or cost-related concerns to deal with), he would most certainly have had a stronger case. Another point of departure would be a contrast of a two-player fixed-sum game<sup>191</sup> and a multi-player game. In a typical fixed-sum game, such as chess or cards, where the interests of the players (usually two of them) are diametrically opposed (Friedman 2000: 155). A two-player fixed-sum game is relatively simple to resolve, as there is no third party for either party to team up against, but in real life, this type of game is rare; in reality, most games are either multiparty ones or have no fixed sum to the result (Ibid.). Insofar as translation is

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<sup>191</sup> By inference, of course, a zero-sum game is a type (or maybe even a prototype) of a fixed-sum game.

concerned, even if we consider translation a game between the translator and the target audience, or a game between the source legal culture (e.g., civil law as manifested in Germany) and the target legal culture (e.g., common law as manifested in Canada), the end result does not have to be a fixed sum, much less a zero sum, since there are, evidently, cases where both parties become better off and also cases where both parties become worse off because of the translation.

Another venue for game theory application is arguably translation industry norms as a coordination game. A typical coordination game is vehicular driving direction. Some countries require that drivers drive on the right, while some require that they drive on the left, and regardless of the type of traffic (right-hand traffic or left-hand traffic) the road carries, one thing is for sure: most drivers cannot care less about which side to drive on; they actually care more about absolute coordination with other drivers in order to prevent frontal collisions and arrive safely (Georgakopoulos 55). What is special about a coordination game is that unlike a cooperation game like the prisoner's dilemma, neither player really needs to promise the other anything that requires follow-up performance; all they need is a pre-announcement mechanism that guarantees coordination in all motorists, which, in down-to-earth terms, translates comfortably as "norms" of the day (Ibid.). This, I believe, could serve as a useful venue for game theory application on translation in that translators, in some circumstances, do not really have a preference for any one of the multiple possible renderings of a text/term (pail and bucket...what is the difference?); instead, all they need sometimes is just coordination with everyone else in the same industry.

Luckily, things seem to have started to change, as translation scholars seem to have begun to look at translation from various angles for a stronger foothold for their claim of translation as a game. In her paper entitled *A Vision of Translation as Play and Game*, Elena Gheorgita, for one, views translation as a game in the sense that it is technically a mental process during which the translator makes decisions and takes risks as the central player (Gheorgita 2013: 46), assuming that game theory, together with semiotics and choice theory, seems to make the best analysis tools for the translator as a *homo ludens* (Ibid.). Moreover, while she warns that, at this stage, it would be premature to assume that game

theory will eventually provide a way out to our understanding of the process we call translation, she does appear confident that a perspective involving the use of game theory will fortify the knowledge of translators (Ibid.). Now, in real terms, how does game theory play out for Gheorgita? To begin with, a game, in its most primitive form, involves two parties with at least partially mutually conflicting interests who are nonetheless interdependent on each other, and, for her, translation is an infinite game in that, first, the “rules” of it may change at any time (Ibid.), and secondly, there are a number of risks involved in a translator’s routine work, which arises from doubt that originates in what she calls “cognitive dissonance” (Ibid. 49). The ultimate objective on the part of the translator is, according to her, optimization (Ibid. 47), which, in large part, coincides with what economists call “profit maximization”. Furthermore, it is precisely because of these two factors: risk and cognitive dissonance that translation deserves to be considered as a game (Ibid. 50). Unfortunately, on this, I do not see eye to eye with her, for, much as I consider translation to be a game that is subject to game theory, I do not consider it a game for the same reasons as she. For her, apparently, translation is a game simply because risk has many key elements associated with it within the concept “translator” (Ibid. 54), but the truth is that it is not that simple; one cannot say that translation is a game *simply because* there are risks involved in translation. In any case, though, I find it delightful and encouraging that people in translation studies are starting to look beyond Levý’s notion of game when running translation through the lenses of game theory.

#### 4. Cost-and-Benefit Analysis

In its most primitive form, cost-and-benefit analysis is a perspective on trade-off, a mental process we busy ourselves with every day; sometimes our tradeoffs are transparent and straightforward, and sometimes less so. Perhaps because of its “endorsement” by Bentham via his ideology of utilitarianism more than two centuries ago, cost-and-benefit analysis is revered as the “mother of all economic ideas” by many today (Frank 2008: 11). Yet despite its straightforward and intuitive nomenclature, it is not always as simple as it sounds, and

nor does it come free of controversy as a public economics approach.<sup>192</sup> First and foremost, Nobel laureate economist Gary Becker once mentioned in his work *The Economic Approach to Human Behavior* that all human behaviour “can be explained and predicted as a rational calculus of costs and benefits” (Becker 19). And this, in my estimation, must have set the foreground for a cost-and-benefit analysis perspective on translation. Actually, there are some translation theorists who have suggested the “point” and “benefit” of translation in their works, thereby vaguely suggesting their subtle appreciation of cost-and-benefit analysis. In one of her books, the famous literary translator Edith Grossman raised some simple yet sensitive questions such as: What is the point of translating books? Where is the cultural profit, the public good? Why venture into the fearsome and reputedly money-losing enterprise of translation? (all emphases mine) (Grossman 39).

In the simplest sense, a cost-and-benefit analysis refers to “getting things done on the cheap” as well as “gains minus pain”. The goal of this model/frame is to strike a balance between costs on the one hand and benefits (or utility) on the other, and yet, as simple as it may seem, it reveals little about the detailed distribution of the various costs and benefits concerned, and this is just one of the many “fundamental flaws” (Heinzerling and Ackerman 1562). In addition, it also seems to ignore potential cultural factors involved in the model, not to mention that it requires the quantification of factors that are hard to quantify to begin with (Malloy 157). Therefore, it is hardly any surprise that even economists sometimes have doubts about it owing to some highly contested assumptions it makes.

People’s interests come into contact with each other, and they, quite expectedly, come into conflict with one another too. By balancing one interest against another, economists, especially those who are fervent followers of utilitarianism, believe that there will always be one interest with the highest utility reading usually expressed in numeric form that is to be adhered to. This approach is venerated as the “grammar of modern economics” by White (White 1990: 47). However, most importantly, we must not forget that the modern-day

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<sup>192</sup> Quite to the contrary, some economists have been vocal about the inability of cost-and-benefit analysis to resolve public economics issues. Heinzerling and Ackerman have pointed out in their co-authored paper *Pricing the Priceless* that cost-benefit analysis actually promises more than it can deliver in regard to conservation and environmental policy, as it has, according to them, a “flawed method that repeatedly leads to biased and misleading results”. *Vide* Heinzerling and Ackerman, 2002, p. 1562.

requirement for a sensible cost-and-benefit analysis may appear more complicated to the legal translator—actually, to anyone uninitiated, since the process of this analysis may end up highly technical, which involves a wide array of market concepts such as risk, opportunity cost, externalities...just to name a few. In relation to law and economics, as scholars have reluctantly acknowledged, many values are simply not readily quantifiable, and these include environmental values, esthetics, human values, and they, more often than not, risk getting undervalued or completely ignored in the course of a cost-and-benefit analysis (Malloy 161). This has led a great many economists, who, again, are skeptical of the quantification of costs and benefits, to question the validity of cost-and-benefit analysis. Another thing is that no government body or agency is widely trusted enough to be able to undertake a balanced and unbiased appraisal (Sunstein 390).

At face value, cost-and-benefit analysis seems fairly straightforward: “gains minus pains”, but in practice, controversies abound. In the public arena, when the government is formulating a public policy that constitutes a Pareto improvement (or a Pareto superior state), a thorough and accurate accounting of all costs and benefits associated with each of the programs/options under consideration must be conducted (Reder 220). Simple as it is, this was in fact the first example in which economics made itself available for the solution of social issues a few decades ago (Ibid.). This framework has long been applied to the feasibility and desirability of many government projects and public investment projects—mostly in the public arena—both prospectively and retrospectively (Ibid.). At a minimum, any proposed action/project must be able to pass, preferably, the Pareto optimality test<sup>193</sup>, or at least the Pareto superior test, but the actual calculation methods may vary. A cost-and-benefit analysis, while not perfect, can serve as a check-and-balance mechanism on almost any government campaign on a new policy with its potential for multiple implications, particularly in the wake of a high-profile event (say mass murders committed by a serial killer) that might trigger a public outcry for speedy legislation. At a minimum, a cost-and-benefit analysis will “widen the viewscreens of political actors and reduce errors” (Sunstein 390).

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<sup>193</sup> If a situation has the characteristic that no change to it could possibly make someone better off without making another person worse off at the same time, then it is said to be of Pareto optimality. If a change like this is possible, then the change would be a Pareto improvement.

As an antithesis, cost-and-benefit analysis may not always be innocent. In the landmark product liability and personal injury case *Grimshaw v. Ford Motor Co.* (119 Cal. App. 3d 757) of the year of 1978, the car manufacturer was reported to have maintained that, as per a simple cost-and-benefit analysis, the potential cost of remunerating victims was substantially lower than the cost of recalling and retrofitting every car that is circulating on the market (Malloy 37). In the long run, the jury found for the plaintiffs/product consumers, and the award granted in this case was allegedly the largest one against any carmaker at the time. Of course, in retrospect, one can easily argue that the carmaker was simply following the logic of profit maximization via a well thought-out cost-and-benefit analysis—no matter how distasteful it would sound to the moral philosopher's ears.

In determining a Pareto improvement, the first step would be to calculate and compare the sums of all costs and all benefits associated with each of the alternatives/options under consideration. Of course, eventually the option that generates the greatest reading of benefits over costs should prevail. Again, determining the magnitude of the relevant costs and benefits could be a challenge for costs and benefits that have no stable market counterparts; i.e., ones that are not normally traded and exchanged on the free market. In addition, there is no universal way of measuring the costs and benefits from a change or an action and comparing them with what was predicted in the beginning, not to mention that, in most cases, neither the costs nor the benefits of a project can be easily inferred from objective actions but must be assessed from subjective reports and subjective accounts (Reder 222). This definitely casts doubt on the integrity of cost-and-benefit analysis.

Another front in law and economics that the cost-and-benefit analysis can contribute dearly to is liability and damages, in which negligence and/or malicious intent must be proven (Malloy 158). Legal standards can be made clear and specific via a cost-and-benefit analysis, or more specifically, with the Hand formula, which was developed by Judge Learned Hand in the well-known case, *United States v. Carroll Towing Co.*<sup>194</sup>. Judge Hand thought that legal liability can be expressed in the form of an expression involving three variables: P, B and L. Basically, what the Hand formula boils down to is when  $PL > B$ , the party is considered negligent in the eyes of the law, where L stands for the magnitude of the

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<sup>194</sup> Case citation: 159 F. 2d 169 (2d. Cir. 1947).

loss should it occur, P stands for the probability of loss and B is the cost of prevention. The logic behind it is simple; as long as the benefit associated with taking precaution outweighs the damage/loss therefore, precaution ought to be encouraged if not compelled.

Unmistakably, under the Hand formula, when PL is greater than B, the party suffering the damage would be considered negligent, since they could have prevented the loss or damage at a much lower cost—but chose not to. Put another way, if the actor has a choice of taking preventive actions to avoid an accident, then the Hand formula, in a way, advises him of the potential (legal) price of each of the options he faces (Harrison 155). His passing on an opportunity to take preventive measures can lead to a possible legal action.

Luckily, there have been a few works scattered across translation studies scholarship that touch on cost-and-benefit analysis. Pym, for one, by way of meso-economics<sup>195</sup>, seeks to provide justification for some aspects of translation activities. In his narrative, transaction costs can include the production, location, transfer, translation and evaluation of information. He points out that a fundamental success condition of all communication acts is mutual benefit (Pym 2004). In addition, Lynn Webb, for one, published a master's thesis entitled *Advantages and Disadvantages of Translation Memory: A Cost/Benefit Analysis*. In her paper, she suggests that Translation Memory (TM) be used only in certain circumstances, with both related costs and potential benefits all taken into consideration against a wide range of criteria such as project type (team project or individual project), text type, time allowance, language pair, pay rate and percentage of repeat content in source text...etc, all of which concern the cost-effectiveness of adopting a TM (Webb 18 *et seq.*). The related costs include TM software, some necessary hardware upgrades and access to TM databases, whereas the potential benefits include speed (especially if there is a large amount of repetitive content involved), better allocation of time in accordance to the rate being paid by the client (Ibid. 19 *et seq.*). In her paper, she presents quite some data and statistics in the form of tables and diagrams, through which she intends to demonstrate the maximization of the difference between cost and revenue for a translator or a translation

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<sup>195</sup> Mesoeconomics is a branch within economics, alongside microeconomics and macroeconomics, located at an intermediate level between the two mainstream branches. This fairly new paradigm of economics focuses on economic establishments such as markets and similar institutional arrangements, in which conventional market forces (like supply and demand) take effect. Two areas that are considered fair game in meso-economics are institutional economics and information theory. The term was first coined by Kurt Dopfer, a University of St. Gallen economist. For details, *vide* Chan, 2008, p. 6.



agency with a full-on cost-and-benefit analysis. All in all, despite her occasional confusion with individual economic terms due to her apparent lack of rigorous training in economics<sup>196</sup>, I am delighted to be able to witness the paradigm of cost-and-benefit analysis being adopted by a translator and translation theorist via some real-life examples.

What the approach/framework of cost-and-benefit analysis implies for legal translation is rather obvious. First off, cost-and-benefit analysis, like all forms of accounting, does not carry moral or ethical values per se. Second of all, while it started out as a framework for government policy decisions, it may be extended to include all kinds of projects, programs and human activities that involve feasibility via profit calculation, as shown in the Ford Pinto case. As long as there is an activity going on through which the participant/actor is attempting to accomplish something with more than one option available, then there will always be a cost-and-benefit analysis in operation on the part of the actor in pursuit of maximum utility/benefit.

In light of how cost-and-benefit analysis works, let's take this legal term as a quick example: the criminal law term in German *Tatbestandsmäßigkeit*, which is a *sine qua non* for an action to constitute a criminal offence. Literally, *Mässigkeit* (noun form of the adjective *mäßig*) means “moderation” or “average”, and *Tatbestand* refers to the entire set of constituent elements or requirements of a crime, while *Tatbestandsmerkmal* refers to the individual elements within that set of elements. And an act that satisfies all *Tatbestandsmerkmal* within a *Tatbestand* of an offence will, by inference, constitute that crime. Now, are these terms really to be translated as such? Applying the framework of a cost-and-benefit analysis to translation, I think that anything as large as a translation project and anything as small as a rendering of an individual term must be assessed by means of a cost-and-benefit calculus to ensure that the potential benefits to be achieved will outweigh all possible costs to be incurred, and apparently, in our simple case, literal translation into English will probably fail to convey the accurate spirit of the German law concepts.

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<sup>196</sup> This is rather obvious in light of the way her paper is presented, as the economic paradigm of cost-and-benefit analysis never cut across the core of her paper in the form of citations or footnotes from economics publications, not to mention that some terms were not duly utilized (e.g., “income” instead of *revenue*).

Once again, cost-and-benefit analysis, however controversial, should be accepted as a useful tool for processing information and conducting speculative inquiry, as it, as asserted by Malloy, “serves as a baseline for mapping various frames, references and representations, and not as a scientific equation for calculating precise answers to complex socio-legal problems” (Malloy 158). His position was seconded by Sunstein, as previously indicated.

## 5. Externality

Theoretically, an act of exchange is assumed to affect the interest/welfare of no one but the parties directly involved<sup>197</sup> (Reder 219). Yet, as we are well aware, reality rarely conforms to theory on this, and the hard truth is, whatever we engage in right now does and will have an effect on people now or later who have had no control over our actions. In the economically mundane world, all production and exchange, more likely than not, does affect individuals other than those directly involved. Regarded as a “spillover” by some, an externality is, by definition, any adverse (or beneficial) side effect of consumption or production, for which no compensation is required (or received) at all (Malloy 177). Indeed, traditional approaches to market analysis tend to focus on no one but the individual, who makes choices and decisions by himself and for himself (Malloy 114). There is nothing inherently wrong with this, but one should never forget another equally important element of human behaviour, and that is the locus of the behaviour. In the loosest terms, anything that could have an involuntary effect on another party can be categorically called an externality. Also, whether one has a legal right or a moral right to a certain value or interest is somewhat irrelevant, and there might technically still be an externality, but some economists prefer to restrict it to cases where appropriate monetary compensation arrangements are never made (Leach 6). Either way, someone involved is somehow getting a “free ride” for something. Externalities, as mentioned previously, are closely tied to a cost-and-benefit analysis, and yet, this is probably one of the most frequently disregarded economic constructs of all. Basically, there are two types of externalities: positive and negative. The emission of air waste or water waste is a typical negative externality, whereas

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<sup>197</sup> In contract law, we call this the principle of privity.

a busker performing acrobatics on the street in open air in full view of all passers-by would be a typical example of positive externality. By the way, in many cases, a positive externality oftentimes is the direct result of a public good being provided gratis to an indefinite class of consumers such as a radio broadcast (which can be received by everyone within its coverage area) and a clever invention (which might be exploited by everyone once its procedure is disclosed) that may or may not have any commercial value. Information, once it is made public, is another public good that comes up in arguments for positive externalities very often. More on this later,

Presumably, there can be no economic activity (or any human activity at all) without at least some externalities—negative or positive. The question then is where to draw the line between externalities that count and ones that are too minor and remote to be given any thought (Malloy 118).<sup>198</sup> The search for and the identification of an externality can be a formidable task, not to mention the assessment and enforcement of responsibility sharing among all parties concerned might be yet another source of contest. Furthermore, more importantly, there is another aspect to externalities that economists call rhetorical, and that is whenever a voluntary exchange/transaction needs to be interfered with or challenged, the exchange, which would otherwise be deemed voluntary and mutually beneficial, could be accused of being against public interest because of the externalities—foreseeable, potential or otherwise—it may have caused (Ibid.). Put another way, negative externalities can be a ready and easy “scapegoat” whenever the government wants to ban or tax something, while a positive externality can be a convenient way of window-dressing one’s profession—or whatever one wants subsidized by the government (Friedman 1996: 272). These work almost like hard and fast “rules”.

By now, one should be able to see the conflict between private interest and public interest, as well as why tensions between the two must be mediated and resolved such that a common interest can be identified and facilitated. All this serves to show us that a competitive market does not always live up to its ideals. There are exchanges/transactions

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<sup>198</sup> By the way, this type of externality, a situation in which the negative externalities and the positive ones cancel each other out, is termed “pecuniary externality” by David Friedman. An action that imposes neither net costs nor net benefits can be ignored from our calculus as it will not produce an inefficient outcome. *Vide* Friedman, 1996, p. 272.

where the parties do not get to duly assess the costs and benefits of their exchanges. Typically a negative externality is one for which the cost is internalized but not the profit, while a positive externality is one for which the profit is internalized and not the cost. If a negative externality does not get internalized, then the parties cannot account for the actual costs of their actions and might get the wrong impression that the exchange (or the action) is worthwhile and cost-efficient; if a positive externality does not get internalized, like in the case of an inventor having no control over the use of his invention once it is publicized and put into use, then the good/service might risk being produced inefficiently. In Malloy's words, a negative externality is an equitable servitude over another person's property or interests for free (Malloy 118). This is why we have pollution fines and intellectual property entitlements such as copyright and trademark.

Another center of gravity in the study of externalities is its link with public goods. Information is a typical public good thereby making the market for information a peculiar one (Hylton 5). As a general rule, free-riding occurs whenever people are able to take advantage of the benefits of activities/actions of others without having to pay for them. As a result, goods for which there exist positive externalities may not be produced at allocatively efficient levels (Harrison 48). Producing information for purchase would not really be a realistic option as property rights in it are often unstable and insecure (Friedman 1996: 275). Not surprisingly, then, information, as a public good, often gets underproduced. In other words, the market receives a false signal from the "consumers" as to the value and its impact, and as a result, the demand and the supply of the good or service will get skewed, which will in turn lead to market failure. This is when and where the government should step in and produce—with public funds—the good or service in sufficient quantities, resolving the market failure with often heavy subsidization (Ibid. 49).<sup>199</sup> Clean air and drinkable water can, in a way, be viewed in the same light, and hence the need for government regulation in these sectors.

Translation has been the target of complaint for its presumably narrow scope of applicability. Of course, if translation were a thing free of charge, most people would

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<sup>199</sup> Whether a service or good is (or should be considered) a public good/service is often debatable. While typical examples include national defense and radio and television broadcasting, less obvious and often controversial ones include postal service and public transportation.

probably be supportive of it. However, truth be told, translation does not come free in most cases, and monolingual people would, understandably, be the first to object to translation arising from strict conformity to bi-/multilingualism by law, as they are under the impression that they would be the ones who have the least use of a bilingual text (be it in a street sign or on a consumer product) but would need to share the cost of it regardless. Yet, the truth is, sometimes even bilingual people are against bilingualism because they do not feel the need for the extra cost if a monolingual sign presented in either language is good enough for them. This is a dilemma. While an Anglophone in Canada takes speaking his native language for granted, a Francophone would tend to be more conscious about his native language and cultural background than an Anglophone, just as a southpaw would usually be more conscious of his dexterity than a right-handed person would. Generally speaking, having a native language that is different than that of the vast majority of the population puts one in a decidedly disadvantaged position; not only do they have to bear the cost of acquiring proficiency in a non-native language, they would also have their self-respect compromised because of a sense of feeling left out and inferior (Cameron and Simeon 16). Thus, any translation conducted as a result of a law or policy designed to promote multilingualism is likely to be perceived as fundamental by a Francophone and as pointless by an Anglophone, and yet, regardless of their language abilities, they would both have to bear the total cost of translation equally. This would be a typical example of negative externality perceived as being “imposed” coercively on a group of people who are in no need of French translation. As a result, in Canada at least, in order to encourage people and businesses to provide their goods/services in both official languages through translation, a multilingualism policy had to be introduced and enforced such that the side effect of negative externalities could be overcome.

The complexity surrounding externalities is beyond description, as it touches on many a topic like government budgeting, public choice, efficiency and internalization. Even moral hazard can be caused by inefficiency from externalities. For instance, once I have my house insured for fire at a premium of, say, 0.1% of what the house is currently worth, then I may have the urge to stop taking precautions like putting in a fire alarm or making sure the fire exit is clean and clear at all times, as, conceivably, this will convey a positive externality on the insurance company at my personal expense. A situation like this would be inefficient

because I am in the best position to take precautions at the lowest cost possible, but I do not bother, and, as a result, I will impose a great amount of negative externalities on the insurance company, which has little leverage against my inefficient and careless (as well as self-serving) decisions. In response, some law and economics experts have proposed a brilliant idea on top of the Hand formula, proposed by Judge Hand and mentioned previously, arguing that whenever there is an expense, just charge it to whoever could have avoided it most cheaply either by taking due precautions or refraining from engaging in such cost-incurring actions. This is called the “least cost avoider” approach (Farnsworth 2007: 47).

As mentioned earlier, even economists acknowledge that externalities can become very convenient—at times too convenient actually—for anyone seeking government action in the otherwise free and easygoing market place. Thus, depending on the individual experiencing and commenting on it, the effects of bilingualism can be either a negative externality or a positive one. It is not uncommon for an exchange or transaction to yield both negative and positive externalities simultaneously—both within the translation profession and beyond. The tourism industry of Dubrovnik, the city nicknamed the “Pearl of the Adriatic”, makes a notable example. While tourists bring in loads and loads of cash for many businesses that rely heavily on tourists like boat hiring, restaurants and swim and diving gear outlets, many local residents, who, obviously, do not get a cut out of it, lament the misuse, abuse and overuse of local resources by frenzied tourists.<sup>200</sup> In this case, for the former, the influx of tourists from all over the world is undoubtedly a positive externality, but it may well be a negative externality for the latter.

Externalities exist in translation, and I mean both positive and negative ones. Externalities are most conspicuous in the context of legal translation as sanctioned by multilingualism policy, such as consumer product labelling in Canada as stipulated by the *Food and Drugs Act* and *Regulations* and the *Consumer Packaging and Labelling Act* and *Regulations*. Bilingual labelling, however well-intentioned, undoubtedly imposes an extra burden in the form of an extra cost on the industry, the firm, and ultimately, the paying consumer who

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<sup>200</sup> <http://www.traveller.com.au/overcrowded-tourist-cities-dont-send-anymore-tourists-to-dubrovnik--city-considers-limiting-number-of-visitors-gy2k9w>. Accessed on 25 August 2017 at 5:32 BST.

will eventually have to absorb all associated costs reflected in a higher purchase price. In all fairness, legal translation does impose an extra cost the party to carry out the policy—typically the government agency, private business and institution (such as a university) that is required by law to provide it. Bilingual universities do acknowledge the different cost structure precipitated by some extra costs. At the University of Ottawa, Canada’s largest bilingual university, while the institution is widely considered a “far-reaching success”, university management does concede that it costs decidedly more to operate a bilingual university than a monolingual one of comparable size (Mercier and Diaz 3).<sup>201</sup> And yet, nonetheless, despite all their efforts, the government body and the university will not get to reap all the benefits; from their perspective, it will mostly be the monolingual student or teacher who receives the benefit from the extra cost and trouble. On the business front, translation is big business too and does not come cheap either. According to some corporations, most French translation-related costs need to be covered by the corporation or the NGO itself, and this is the principal reason for not producing all documents and data in both official languages cited (Cameron and Simeon 40). Apparently, instead of viewing bilingualism as a proud attribute for a national-level corporation, a good many, regrettably, treat it as little more than a business operation cost to be considered relative to other costs (Ibid. 41). This is one key reason why there is rarely parallel information provided in both versions (if there are bilingual versions to speak of) in the private sector in Canada despite the proportionately large share of the global translation market enjoyed by the Canadian translation industry.<sup>202</sup>

An optional public good is a public good that one can choose to consume any amount of the output provided at any time (including zero), and a non-optional public good is one that is “forced upon” all consumers—not just one or a few—and at all times once it is provided

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<sup>201</sup> According to this report, the costs are generated by multiple factors. Some are associated with the obligation to maintain a larger number of course sections than would be necessary in a monolingual environment. When there is a small overflow of students needing access to a certain course, they cannot be added to the existing sections until such time as the size of the overflow fully justifies the opening of an additional section, because of the language barrier. Other costs are associated with second language training for professors and staff, translating and publishing all publication documents; finding and hiring bilingual staff; providing computer software and services in both languages...just to name a few. Apparently, translation, along with the language policy that sanctions it, does cost money.

<sup>202</sup> Demographic realities have made Canada a worldwide leader in translation in the sense that although it has only 0.5% of the world population, it claims a good 10% of the global translation market. *Vide* Hamilton, 2010, p. 13.

(Gravelle and Rees 326). Of course, the boundary in between, as with all boundaries, is not easily delineated. The defining characteristic of a public good is its “non-rivalness”: consumption of it by one will not preclude consumption by another. Then there is the distinction of optional public good and non-optional public good. National defence is a typical example of a non-optional public good as no citizen, or no “consumer”, gets to opt out of the consumption or “enjoyment” thereof (Ibid.). In this sense, legal translation as required by law would arguably qualify as an optional public good in that anyone can decide whether or not to pay attention to and accept a piece of translation, even if that translation was produced using public funds that were fuelled by taxpayers’ tax dollars.

## 6. Resource Allocation

First of all, please recall the fundamental tenet that the science of economics is essentially about resource allocation and not about money *per se*. Resource allocation suggests, counterintuitive as it may sound, some sort of a lofty ideal: the optimum use and consumption of scarce resources in the form of a state of equilibrium between demand and supply.<sup>203</sup> All things considered, Reder describes and justifies RAP by citing economics as the subject that deals with the allocation of scarce resources among alternative uses for the maximization of want satisfactions (Reder 43). As a result, the condition of optimal allocation of resources should ultimately be the free market mechanism (Dixon in Bartlett 182). For the most part, economists (especially egalitarian ones) generally agree that a resource allocation would be a good one if it satisfies the Pareto optimality criterion (Leach 22). Simply put, an allocation is Pareto optimal if there is absolutely no other alternative allocation at which someone could be made better off without at least one other person being made worse off at the same time.<sup>204</sup> If, after exploiting all possible actions/options, no such alternative allocation is believed to exist, then such a resource allocation is said to be efficient. Apparently, the Pareto standard of efficiency would often be difficult to achieve, especially if it is applied to a public project proposal (Shall we build a new

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<sup>203</sup> Reder prefers to make a dominant paradigm out of it and calls it the “Resource Allocation Paradigm” (RAP).

<sup>204</sup> In fact, surprisingly, the test/criterion of Pareto optimality is not capable of ranking the allocations—either in terms of efficiency or in terms of equity—within each group, as it provides no guidance for selecting one allocation case as all allocations would be grouped together.



highway to ease heavy traffic that will end up costing taxpayers hundreds of millions of dollars and inconveniencing residents who currently live around it?), which usually involve the livelihood of a large number of citizens who will all have to agree to the change in policy, not to mention that there will always be holdouts—people who wait till the last minute to take a position, which is yet another form of inefficiency. Therefore, economists subsequently came up with another index that seeks to soften the negative effects of the Pareto index, and that is Kaldor-Hicks efficiency or wealth maximization. Basically, Kaldor-Hicks efficiency simply requires that individuals that are made better off by a change would have to be made sufficiently better off that they could *potentially* compensate those who are adversely affected by that change (Harrison 35). In addition, the Kaldor-Hicks index does not require the consent of the party being adversely affected as long as they may be hypothetically compensated in terms of value/price (Ibid.). A typical example is majority voting, where a simple majority or even a three-fourths majority would suffice—and not unanimity. These voting schemes are superior to a consensus requirement in that they greatly reduce the power of holdouts (who are hoping for a handsome compensation) without outright denying them the right to considerable compensation; in plain words, these schemes allow policies to be adopted even in the absence of unanimous consent as long as those whose interests are compromised will somehow be compensated. Apparently, given its less stringent criteria, the Kaldor-Hicks efficiency index can apply to more circumstances.

On another front, people's actions are constrained by income, time, imperfect memory and other limited resources, and also by the opportunities available to the actor at any given time and place. These opportunities more or less depend on the individual and collective actions of other individuals and firms. True, constraints have an impact on an actual situation, but the biggest constraint is probably limited time. In recent decades, economic and advances in medicine may have greatly increased people's life expectancy, but nothing could change the physical flow of time itself, which always restricts everyone to 24 hours a day and 7 days a week. As a result, while goods and services have expanded enormously in

rich countries, the total time available to consume has not.<sup>205</sup> Therefore, time has turned itself into a decidedly more luxurious and sought-after commodity.

The subject matter of welfare economics, a branch of economics, is the ethical appraisal of resource allocations (and, by inference, the well-being of the subjects concerned) at different aggregate levels (Gravelle and Rees 279). Welfare and the alignment of individual welfare and collective welfare, which is related to optimal resource allocation, is another issue of consequence. The union between one's personal utility and that of other people and the collective can serve as a benchmark for how interpersonal relations operate (or fail to operate). This leads us to the branch of economics known as welfare economics, the purpose of which is to design and apply criteria of desirability to the various possible alternative states of an economy (Reder 211). Ultimately, welfare economics will point to public choice in that a choice among various economic states has to be made together with the possible effects of economic activities characteristic of each economic state in terms of welfare. Then comes a more complicated and sensitive issue: Does the welfare of all members of a society add up to the social welfare as an aggregate function? (Reder 214) Or, put another way, can we conclude that welfare for the individual has improved simply because aggregate welfare has increased? Some economists who believe in utilitarianism focus on the magnitude of aggregate wealth that passes the Pareto optimality test, while other economists, who are more of a socialist and egalitarian character, claim that true welfare for society at large can only be achieved via distributional justice.

In light of all that, what resource allocation means for legal translation, then, is at least two-dimensional. At the government level, it needs to calculate the value of the benefit or loss to each individual that may be potentially affected by any new action or policy. Indeed, translation policy has a great deal to do with language policy, but the idea that translation will become unnecessary—or even vanish into thin air—once everyone in a community or in the whole world learns the *lingua franca* (presumably English) is just too extreme. In fact, as Michael Cronin has argued, forcing everyone to learn English—or to speak nothing but English from the day they were born—would not be a costless thing; it will still involve

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<sup>205</sup> Depending on how one looks at average life expectancy and the consumption of time, some people do believe that the wealthy and powerful have more time to spend on their hands owing to the (typically) longer lives they live.

some hefty costs. The only thing that will be different, though, is the *bearer* of those costs (Cronin in Glanert 41-42). In his opinion, by virtue of an example from the low-cost airline industry, shifting the cost and burden of language learning from the government to the individual will be far from an optimal resource allocation (Ibid. 42). Drawing upon this argument, if, in the end, a government action or policy is believed to have increased real per capita income without having negative or adverse effects on income distribution, or without having adversely affected work hours or worsened work conditions, then it is said to have enhanced general welfare (Reder 218-219). Apparently, a language policy that seeks to leave out translation expecting everyone to learn the lingua franca should probably not be considered to have enhanced general welfare.

Moreover, in the context of communication theory, some have argued that translation is best deemed a cognitive activity in that translation competence is a type of expert knowledge that requires self-regulatory behaviour in terms of monitoring, resource allocation and planning (Munday 2009: 67-68).

## 7. Asymmetry of Information

Just a few lines back, we were discussing how difficult and important the allocation of scarce resources can be. That statement, while true, lacked one vital component, which will be detailed here, and that is information. If a person or an organization is to make a sensible decision regarding the allocation of resources, then they must be in possession of sufficient and relevant information, other than casual empiricism, to be in a position to judge which option will most likely yield the best results (Peacock 78). Of course, this does not mean that even the most sophisticated and established businesspeople would need basic arithmetic to be able to “do the math”, but it does indicate how vital information is—as well as how to interpret it. As a quick example, in many business transactions, usually only one of the parties (the seller and current owner of a used car or the insured party to an insurance contract), would have more information than the other—more in terms of both quantity and quality. This is a simple yet precise outline of an asymmetry of information, a type of “exchange disparity” (Malloy 172).

While I am not willing to go as far as to claim that “whoever controls information controls the world”, no two individuals will ever have the same amount of information about anything (or anyone), and this, in turn, creates an imbalance of power—a situation known as an “asymmetry of information” in economic terminology. While consumers in a perfect competition market, for one, are assumed to be in possession of perfect information in that they know how to distinguish between different goods/services and they will notice right away if one seller attempts to sell the same thing for a lower price than another seller (Hylton 5). While this assumption is not entirely false, it is too idealistic and thus made chiefly for rhetorical and argumentation purposes (Ibid.). The truth is that everyone bases their actions on the information available to them at the time of action, which may or may not be enough, or even accurate. In brief, asymmetry of information is the situation in which a party to a transaction holds (or withholds) information that is not readily available to other parties, thereby creating an imbalance of power. A typical and yet so simple example would be the seller of an item (especially when it is put up for sale in cyberspace) almost always being guaranteed to know more about the merchandise than the buyer would ever get to (at least until the merchandise is delivered to the buyer). Therefore, in some contexts, perfect competition being one of them, information is a commodity that needs to be supplied—or even bought and sold (Ibid.).<sup>206</sup> As regards its relevance to translation studies, this has been confirmed by Anthony Pym in his work *Translation as a Transaction Cost*, calling such costs “transaction costs” (Pym 1995: 596).

While not all uncertainties necessarily lead to market failure (there are financial products that thrive on this, such as insurance and futures), they could lead to significant efficiencies, or, worse yet, they could lead to asymmetric information held by two potential transaction parties (Leach 293). In addition, it is precisely because of the likelihood of information asymmetry that purchasing information (or easy access to information) in advance is sometimes sensible. By paying some search cost (which, by the way, is almost always a

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<sup>206</sup> The assumption of perfect information is demonstrably important for many economic models to work, especially in a perfect competition market model, as relaxing the assumption of perfect information will immediately entail some element of market failure. But note well that it is just an *assumption*, since we all know very well that in real life, people will never have access to the same amount of information. According to Andy Chan, neo-classical economics got itself into grave trouble by assuming perfect information from the very start. For him, information will always be either asymmetric or imperfect—or both. *Vide* Chan, 2008, p. 22.

sunk cost<sup>207</sup>), one reduces uncertainty and increases the likelihood of a better decision (Friedman 1996: 192). Asymmetry of information can come in the form of either commission or omission, and as some behavioral science studies show, the majority of experiment subjects consider commissions that caused harm to be more morally objectionable than omissions even with intention held constant (Ritov and Baron in Sunstein 170). By the way, while an asymmetry of information is typically present in real-life contractual exchanges<sup>208</sup>, it is most likely to lead to the two phenomena of adverse selection and moral hazard, both of which will be covered briefly later on in this chapter.

Asymmetrical information and risk are so interdependent on each other that some call them “two sides of the same coin” (Malloy 171). And that is not all; it also gives rise to two problems: adverse selection and moral hazard (Leach 293). Such disparity in exchange is the main reason why there is legislation to the effect that products come with a consumer warranty and an insurance policy always requires a duty of disclosure to the fullest extent of the insured. Contexts that typically “thrive” on asymmetrical information include the used car market and the potential employee seeking employment on the job market. Moreover, asymmetric information often leads to economic inefficiency, but not for the obvious reasons that the average person would think (as private net costs are equal to total net costs among all actors). Asymmetry of information, on the whole, can lead to one of these four things: fraud, moral hazard, adverse selection and rent seeking, all of which indicate either an ongoing market failure or a precursor of one.

Basically, adverse selection refers to the possibility of bad or risky trading partners driving away good or less risky ones, which somewhat resonates Gresham’s Law of “Bad money drives out good”. Take art forgery as an example. If art forgery becomes a profitable profession, then resources will get drawn into it from other “legitimate” industries, and forgeries will start to be passed off and sold as originals—for a profit. The existence of forged art may discourage people from purchasing art altogether, and it will definitely divert scarce resources to separating the fake from the real, amounting to an unnecessary

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<sup>207</sup> A sunk cost is, simply put, any cost that cannot be reversed or recovered regardless of the final outcome of one’s actions. A typical example would be one’s college tuition fees, which are payable—and non-refundable—even if a person does not manage to complete their program and earn their degree.

<sup>208</sup> Asymmetry of information exists in tort exchanges too, but in a different way. A tort exchange is rarely mutually voluntary.

waste of resources (Leach 290). These extra out-of-pocket costs must be seen as an externality, or a pecuniary externality to be exact (Friedman 2000: 32). Just as pickpocketing is to be distinguished from pure competition, art forgery amounts to a rent seeking activity through and through. Rent seeking occurs whenever people see an opportunity to spend resources trying to transfer wealth from others to themselves, which eventually leads to a transfer that is neither a net gain nor a net loss along with the expenditures required being a net loss (Ibid. 33-34). Thus, rent seeking is a wasteful practice. A typical (and very real) example of rent seeking would be the fight over Yellow Cab licenses in New York City through bribes and lobbying of government officials in charge of licensing affairs. The last report on the price of a license was about 182,000 dollars, which would, without a doubt, constitute a rent-seeking expenditure: an investment that generates no wealth for the economy (Hylton 2003: 13). Rent seeking, if anything, does nothing to neutralize a monopoly; all it does is determine who (Is it me or my archrival?) earns monopoly profits, which will have no effect on social welfare whatsoever (Leach 223). All the efforts that need to go into the prevention and detection of inappropriate, if not illegal, activities could have been otherwise diverted to more productive work, resulting in an indirect loss in the nation's GDP. On the other hand, there is one upside to adverse selection caused by asymmetric information, and that is the need for universal health care, where bad risks can be easily evened out by good ones with every citizen being in the same pool, thereby, in effect, eliminating the possibility of adverse selection. This is even praised as a "group policy carried to its ultimate extreme" by David Friedman (Friedman 1996: 276).

What does this mean for translation? Luckily, asymmetry of information did not go completely unnoticed in translation circles; in fact, Pym, while stressing the importance of trust between client and translator, as well as the importance of creditworthiness from the target reader for the translator, does acknowledge one very cold and hard fact: just as lawyers know more about what the law can (and cannot) do for their aggrieved clients (who, most likely, are laypersons of law), translators typically know more about the source text, the source culture and the source language (but not necessarily the subject matter) than the target reader, and whoever is retaining their service has little check and balance against them other than relying on some very superficially objective credentials such as education

background, training, institutional accreditation and social experience...(Pym 2015: 70). Needless to say, it would be fairly easy for the translator to abuse his status by deceiving or defrauding his client and/or the target readership with any “insider information” he may happen to hold (and hence, again, the well-known allusion *Traduttore, traditore!*). In translation scholarship, translation has long been defined by some as an activity in which an unequal power relationship is reflected subtly via textual production, during which a “superior” original is turned into an “inferior” copy (Bassnett 4-5). Gone are those colonial days in most parts of the world, but whether translation is seen as a postcolonial, postmodern or post-structural phenomenon, and whether we consider translation to be a platform that is multicultural, multilingual or multiethnic, the translator will always be the one wielding power vis-à-vis the gullible target reader. This will be hard to change. Power *per se*—if exercised in moderation—is not necessarily evil, but if translators take excessive liberties with the superior position they enjoy in their line of duty, only to lose the trust of all other parties involved (the author, the target reader, the publisher...), then their credibility will be jeopardized to the detriment of all translators’ reputation. In the end, adverse selection will likely ensue, undermining the reputation and wages of every translator in the industry, and the translators that are most likely to suffer will be the rule-abiding and honest ones, who would have otherwise been paid more for their service. Those who know how to outsmart the system, ironically, will get to survive and even drive out the ones who do not. The scenario would then turn into something like the health insurance market, where healthy and honest people are either denied insurance coverage altogether or quoted a ridiculously high premium rate because of an influx of dishonest and unhealthy people either being offered an insurance policy through deception about their true health conditions or, worse yet, filing fraudulent insurance claims—which has been cited above.

Indeed, something like this will, of course, defeat the purpose of undertaking legal translation in the first place, especially when legal translation is expected to transcend language boundaries in the interest of every individual who happens to fall under the jurisdiction of the relevant legal regime. The free movement of laws and judicial decisions across the EU will not be possible if legal translation, which is the medium of justice, falls victim to asymmetry of information, and also to the risk and moral hazard that come with it. The incarnation of Gresham’s Law—that bad money drives out good money—in the

context of legal translation will then become a killer of dreams and a dasher of hopes for everyone, translators and non-translators alike. Something like this should never be allowed to happen.

The position of the translator has been discussed at length in translation studies circles, where the majority of translation theorists seem to concur that the translator occupies a space between two languages and/or cultures not just in terms of his spatiotemporal positioning, but also his ideological positioning (Tymoczko in Baker 2010: 217). More specifically, translation has been characterized as a place or a space in between other spaces—though not without controversy (Ibid.). Tymoczko believes that the translator, being loyal to dissident ideologies and internal to a culture or to affiliations external to a culture, can easily become a “traitor from within” or an “agent from without” (Ibid. 226). Either way, one thing is for sure: the translator is in possession of information that is not transparent and obvious to most other actors across the translation field. Meanwhile, on another front, a front that is more “macroeconomic” in scope, Andy Chan argues that regarding the competence of translators and the quality of their works on the market at large, it is typically difficult for potential clients to assess the competence of a translator—either in terms of language ability, translation skills or subject-matter knowledge—until some formal understanding has been established (Chan 28), not to mention that the translation market is volatile in that there is no “fixed amount” of translators at any given moment, as there will always be people with some interest in translation passing themselves off as translators, for a career or for leisure (Ibid). This asymmetry of information actually has wide ripple effects that include good translators being underpaid and competent translators leaving the profession altogether, leaving us with an overwhelming surplus of subpar translators (Chan 30). This would absolutely be a result of adverse selection.

In response to this anomaly, Chan recommends the certification of translator qualifications (most likely with industry-wide standardized tests) and recommended compensation rates for translators published by translator associations (Ibid. 33). Of course, these mechanisms are not as simple as they sound, and nor will they be any cure-all for the asymmetry of information. Chan, however, concedes that, at a minimum, despite the incomplete nature in



them, they nonetheless offer a signal that may help consumers of translation services to determine the quality of the services they are contemplating purchasing before actually purchasing them (Ibid. 34).

## 8. Moral Hazard

A moral hazard is a situation where someone is involuntarily compelled to bear the consequences of another person's actions—with or without their knowledge. Intuitively, information is a key factor in the occurrence of moral hazard. Essentially, it is as much a risk-related problem as it is an externality problem in that it involves part of the cost or risk being shifted to someone else that may result in the failure to take precaution on the part of the party that the risk is shifted away from. A moral hazard occurs whenever the actions of one party may change to the detriment of another party (i.e., a “hidden action”) after a transaction or exchange has taken place, and, understandably, it is brought up in the context of insurance law very often, as the failure of the insured to take cost-justified precautions once he has shifted the risk that the precautions are supposed to protect against over to the insurance company is very common (Friedman 2000: 66). The careless and risky behaviour that an insurance policyholder might engage in, knowing very well that he will always “have something to fall back on”, constitutes a moral hazard (Now, why should I bother to turn off the stove when my house is covered by a fire insurance policy?). Essentially, therefore, a moral hazard is an externality viewed from a unique perspective (Friedman 1996: 277). In theory, the moral hazard problem can be eliminated, or at least significantly reduced, if the insurance premium depends on how much care is exercised and how much damage was *mitigated* by the insured, but in practice, this might not be possible because it would be very costly for the insurance company to duly monitor the temperance and behavior of the person being insured vis-à-vis the object being insured (Polinsky 61). Once policyholders insure their homes against fire, chances are they would turn reckless all of a sudden, for their change in behaviour would become that much more profitable; but at the same time, it would take a toll on the insurance company and, in turn, on all policyholders as a class. Why? Because insurance payouts are financed from premiums collected from (or “pooled” from) all policyholders, and if everyone were just a little more mindful of what

they do and how they do it, then insurance premiums could probably be reduced by enough to make everyone better off (Leach 290). This is why partial insurance coverage in the form of either a deductible (where the insured is responsible for the, say, first 200 dollars of his loss) or a co-insurance policy (i.e., the insured bears a certain percentage of the loss, say 20%) is prevalent throughout the insurance industry (especially for insurance policyholders with little or no credit history), not to mention requiring some precautions of the insured (such as putting in an alarm or a sprinkler, maybe even at the expense of the insurance company) as well as requiring the insured party to take actions to mitigate the damage. All in all, the bottom line should be for the insurance contract to have an actuarially fair premium, one that does not alter the insured individual's expected income (profit), otherwise the odds of the defined event (such as death or fire) covered by the policy happening will be very high indeed (Gravelle and Rees 509).

As described above, moral hazard is a real concern whenever there are both risk and asymmetric information involved. It is most conspicuous when the person bearing the cost of avoiding or eliminating the risk and the person reaping the benefits of such action are two different persons. This should raise no eyebrow, as human beings are assumed to be rational and self-interested from the very beginning, and we know that individual choice is influenced by knowledge of social efforts to reduce the impact of bad choices. In addition, if only the policyholder knows their risk class and not the insurance company (i.e., "hidden information"), then we will also have a further problem of adverse selection (Ibid.). Also, not all risks are insurable, and those that are not are excluded for a host of reasons, the most common one being the impossibility of verification of loss or damage (Ibid. 515). Of course, the desirability of a specific insurance policy and whether to purchase insurance coverage at all depends in large part on the insurance premium (affordability of the policy), and also on the risk preference on the part of the insured (whether he is risk-neutral, risk-adverse or risk-preferring). On a larger scale, however, because of potential moral hazards, some well-intended public policies and legislations may wind up encouraging people to engage in the very behaviour that the public policy or the legislation is trying to prevent in the first place.

In addition to moral hazard, another problem that stems from a similar imbalance in information is adverse selection. Both moral hazard and adverse selection are exchange disparities stemming from asymmetric information; they are, in a way, in a matter-antimatter relation.<sup>209</sup> Adverse selection is the unfortunate but likely result in an asymmetry of information situation where it is difficult or prohibitively costly to detect what information has been suppressed or misrepresented. Any missing information that proves vital will likely turn out to be a source of moral hazard (e.g., one party cheating on the deal), which, in turn, will end up becoming an adverse selection for the other party (often a bank or an insurance company). Admittedly, as circumstances change, so do the dynamics of the exchange, and this may trigger misconduct in one party that the other party never anticipated (Malloy 175). An easy-to-understand example would be something like this: travel insurance coverage provided by a bank in cooperation with an insurance company would probably not be as minimal and restrictive if there were not so many daredevil-like travellers who manipulate and try to outwit the system by engaging in risky behaviour on a holiday purchased with a credit card issued by the bank; this only ends up putting off and scaring away honest and well-behaved cardholders-policyholders-travellers, who would have to look elsewhere for better insurance coverage for even a higher premium rate (if this is possible at all).

What does moral hazard, which stems from externalities coupled with asymmetric information, mean for translation? At a minimum, there is always some risk involved in translation, as has been demonstrated earlier in this thesis. Now, the only difference is this: Is it possible for the translator to transfer, or eliminate, or “pool off” the risk in translation? The translator, therefore, would attempt to shift some of the risk, which Pym calls “uncertainty risk”, to the client when handling sensitive and hard-to-translate situations (Pym 2015: 70). After all, there are things that are known only to the translator, who is ideally supposed to be the “middleman” or “broker” of cultures/languages. The translator is undoubtedly in a position to engage in risky and careless behaviour once a deal is cut between himself and the publisher and/or the author, as he is arguably the ultimate

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<sup>209</sup> Of course, fraud (or an even more heinous crime) would be yet another exchange disparity caused by asymmetric information, but due to space constraints and relevance to legal translation, I will limit my narrative to just these two.

constructor of the new text that is supposed to be multilingual and multicultural, with the author and all other actors having little leverage against him. But this may all change if and when the translator is being paid a higher wage by the publisher.

In addition, as regards externalities, from which moral hazard stems, whatever the translator decides to engage in will have an effect, direct or indirect, on the society that he is a part of. Today, it would be far-fetched to claim that an exchange or transaction concerns no one but the parties concerned (or, in a single-party action, only the actor), as more and more transactions are having a public dimension to them along with a private one, and, little by little, people are expected to incorporate public interest into their allegedly “private” exchanges today (Malloy 117). Apparently, even a presumably single-party action, such as fastening one’s seatbelt when seated behind the steering wheel, can impose an externality on society at large, thereby justifying the practice of paternalism in the legal—and political—context. Hence, the translator cannot flat out claim that only he should have a say on how to carry out his task, as what he serves the target readership with is his own “business” and no one else’s.<sup>210</sup> This is particularly true of legal translation, which may affect many more people than the translator can ever imagine, making co-drafting, the process of engaging law experts in the bi-/multilingual drafting stage (something that will be covered later) a preferable form of legal “translation”. Another significant side effect of asymmetrical information apart from moral hazard would be adverse selection, which is, as presented a few paragraphs back, the situation in which the competent legal translator, who is more bijural, bicultural and bilingual than the not-so-competent legal translator, getting chased out of the market, or at least severely sacrificed because of other legal translators, who might not be as bijural, bicultural and bilingual, but nonetheless get to secure translation service contracts with organizations or individuals who just intend to fulfill the minimum language requirement as required by law thanks to their lower fees, might as a result, have an adverse selection on the general pool of legal translators. As well, the repercussion that adverse selection can have on translation is

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<sup>210</sup> Of course, the censor, when carrying out a censorship, will most likely make a claim like this in an effort to justify his alleged paternalism. While I am not commenting on censorship on translation in this research in any real sense, this in no way suggests that I support censorship in any form for any work in any place.

universal self-censorship on the part of the legal translator—often a direct result of state censorship.<sup>211</sup>

Finally, since adverse selection and moral hazard, along with the asymmetry of information, are all closely linked to trust and risk that may lead to market failure (even in the context of legal translation), one very important point must be made here. As Pym notes, if we prefer to think of the practice of translation as somehow beneficial for all parties and, as such, must be stipulated and regulated by the law, then the loss of trust and faith of anyone in anything will ultimately be a loss for all parties (Pym 2015: 70). Thus, no legal translator or member of the translation community (publishers, authors and even translation theorists) should be foolish enough to resort to any moral hazard or adverse selection by taking advantage of a situation of risk and externalities. This would be short-sighted, and it is something none of us can afford to overlook.

#### 9. Equivalence as Equilibrium: The Ultimate Value for Legal Translation?

At first glance, the terms *equivalence* and *equilibrium* both conjure up an image of peace and harmony, and this goes far beyond their resemblance in orthography. Indeed, they are by no means elusive concepts. For starters, every translation studies dictionary or encyclopedia must come with an entry “equivalence” (e.g., on page 185 of *The Routledge Companion to Translation Studies* edited by Munday, in which it is termed a “key concept”), while every economics dictionary must necessarily come with an entry entitled “equilibrium”. In addition, they also seem to resonate each other in a romantic way, one presumably being the ultimate status pursued by the translator and the other by the economist. Moreover, as we will find out soon, equilibrium and equivalence somehow play similar roles in their respective disciplines; also, they both are (or have been) values revered by their respective scholarships, with equivalence—rightfully or wrongfully—being considered by many as the ultimate and optimal state between the target text and the source text, as demonstrated by some influential works such as Mona Baker’s *In Other Words* (Baker 5-6). Almost every economics textbook has a good proportion of its contents

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<sup>211</sup> Once again, censorship and self-censorship are two fascinating topics for another research, and as far as my thesis is concerned, they will only get this much coverage.

dedicated to the topic “equilibrium”, be it market equilibrium or price equilibrium, seemingly making it a state of perfection. In this sense, equilibrium and equivalence both seem to provide economist and translation theorists, respectively, something to aim for and contemplate on, and this extends far beyond their pedantic attention to details.

And yet, at the same time, as suggested by academics in either field, they both appear just as remote and idealistic, possibly existing only in textbooks (the same way fairies exist in fairytales) meant for students and scholars who know little about what is actually happening outside the ivory tower, and this, in turn, gives them that extra shade of shared mysteriousness and charm. Frustrated that reality rarely conforms to theory, some translation theorists even went as far as to comment that the concept of equivalence, being of vital importance as it is, is a “much used and abused term in translation studies” (Bassnett 32). Apparently, on a balance of probabilities, the two values seem to “enjoy” an equal share of praise and criticism that is centered on a common core: in all usages of both terms, something that easily shifts and fluctuates seems to be converging slowly to a state of being stable and stationary. This, I believe, might be a sign that the economic concept of equilibrium can serve as a useful parameter for a better understanding of the translation endeavour. So, in real terms, what can we make of this potential link at all if it can be established? Before we are in a position to answer this, we will have to examine the two concepts thoroughly in their respective contexts in search of a common ground.

For its part, the term “equilibrium” seems like a magic word with an irresistible spell, having made its presence in a number of different sciences, economics proudly being one of them (ecology being another). Since the days of neoclassical economics, the search for equilibrium has largely been high on the agenda of economists. Yet, what do we mean by *equilibrium* in the economic sense? To make a long story short, in the most general terms, an equilibrium is a state in which no one needs to change their action or behaviour in pursuit of a bigger payoff (because any such attempt would not change anything anyway). Simple enough! In more professional terms, an equilibrium state is a situation where all forces determining the state of that system are in perfect balance such that there would be no incentive for any actor or any variables anyone manipulates within the system to make any change (Gravelle and Rees 7). In pure economic terms, in a state of equilibrium,

economic variables remain unchanged from their equilibrium values in the absence of external interference, making the equilibrium a state in which no actor, no participant—simply nobody—needs to change or modify their actions, thereby allowing the *status quo* to remain and persist. As the concept of equilibrium seems to have originated in the fundamental paradigm of supply and demand, initially equilibrium used to refer exclusively to the price and quantity at which there is no excess supply or unfulfilled demand (Reder 55). In the model of simple supply and demand, the equilibrium price is the price that clears the market, leaving no excess supply or excess demand behind; in the modeling of economic networks/ties, an equilibrium is an end state or a developed state where there would normally be no change in the pattern of ties, unless outside environmental conditions change (Rauch 5). Therefore, an equilibrium seems to be a *spontaneous* state, meaning one that occurs independently of the deliberate action on the part of any individual or firm. Of course, however, two important presumptions must be made here: first, all other services/goods hold steady at their current equilibrium levels (i.e., *ceteris paribus* equilibrium) and, secondly, the quantity of service or good being traded/bought/sold by any individual or firm has no effect whatsoever on the market price thereof (Reder 55).<sup>212</sup>

From a more panoramic perspective, in relation to a single market in the context of microeconomics, the economy of a community is considered to be *in equilibrium* when firms have collectively chosen to produce the level of output that exactly matches the level of demand (Michl 2002: 34), and competitive equilibrium is attained when each individual and firm believes that there is nothing they can do to influence any price at which goods or services are traded, their best bet being to just sell their goods or services at the ongoing market price for the quantity determined (Leach 64). Equilibrium is also the ultimate state under perfect competition where firms earn long-term zero economic profit (Hylton 9).<sup>213</sup>

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<sup>212</sup> Indeed, these assumptions do come with some controversy, even if they are made for the sake of sustainable logical integrity. Some think that quantity restrictions on the part of suppliers or demanders or both are a reality (Reder 56), while others believe that a consumer will almost undoubtedly change his spending patterns in the wake of a price change in one good/service, thereby spending more (or less) on some other good/service (Friedman 1996: 105).

<sup>213</sup> For the short term, however, individual firms may still earn positive (or even negative) economic profit. Also, economic profit is different from accounting profit in that economic profit takes into account the risk incurred and the opportunity cost of capital from which the revenue arose. In brief, economic profit is the figure obtained from accounting profit less all opportunity costs. Of course, obviously, it will be perfectly possible for a firm to turn a positive accounting profit—both in the short term and the long term, and, as well, it is equally possible for a firm to be earning *positive* accounting profits and *negative* economic profits.

By contrast, in the context of macroeconomics, an equilibrium is explained and predicted with the IS-LM model, where the IS curve represents the correlation between interest rate and the equilibrium level of GDP; the LM curve represents the fact that  $L$  (for liquidity preference) equals the supply of money,  $M$ , a condition for equilibrium in the capital market. The IS-LM model forms the core of macroeconomic theory (Michl 49). In terms of classification, there are two types of equilibrium: partial equilibrium and general equilibrium. A partial equilibrium analysis is an analysis of the effect of changes in the market for one good or service while ignoring the effects on most other goods/services (Friedman 1996: 104); in other words, it is a *ceteris paribus* analysis. In contrast, a general equilibrium analysis is an analysis that treats the entire economy as an interdependent whole, looking beyond the production and consumption of any single good/service (Ibid.). The effect of one price change is typically spread across thousands, if not millions, of goods and services, and so downplaying it, or even ignoring it altogether, might be a legitimate thing to do. In any case, needless to say, a general analysis will be much more complex than a partial analysis.

Thus, for the sake of convenient generalization, the equilibrium of a market system (either a single market or a whole economy) is attained when these two conditions are met: (a) individual decision makers have no reason to change their paths; (b) the plans of decision makers (in general) are consistent and can be effectuated (Gravelle and Rees 2004: 8). The significance of the equilibrium concept lies in the fact that it provides a solution based on the operating forces (e.g., supply and demand are two very typical operating forces) identified—provided that at least one equilibrium state exists<sup>214</sup>. Economic methodology, especially microeconomic analysis, is very useful for its universal relevance in all types of economies, centralized (where many goods and services are state-owned and government-operated) and decentralized (where private ownership is the norm) alike. This is precisely the framework being proposed by hard-line economists who are exceptionally protective of their discipline. They believe that whatever the institutional framework of the economy may be, an equilibrium can always be detected and examined with microeconomic theory,

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<sup>214</sup> An equilibrium state might not even exist at all within a system; even if one does exist, it might not be a stable one, meaning it is hardly attainable, not to mention that there might be more than one equilibrium state within a system.



and this should be the case for any research that is conducted on human behaviour (Ibid. 9). The belief in equilibrium across economics scholarship is so entrenched that some have gone as far as to dismiss any economic model as “incomplete” if it fails to discover or arrive at an end state where no one would have the incentive to make any changes to the *status quo* (Rauch 5).

That being said, an equilibrium is a passive and spontaneous thing in most cases in the sense that it is normally determined not by the interested parties through their free will, but by the joint actions (“push and pull”) of all parties concerned, which may or may not be concerted or coordinated (Hylton 3). In other words, an equilibrium—typically one in price—is a market state that is spontaneously determined by a number of market forces—usually beyond the control of the parties, such as supply and demand in the case of a market equilibrium, to which infra-marginal producers and infra-marginal consumers are constantly and subconsciously subjected (Hylton 2-3). A state of equilibrium requires that every party concerned be at an optimum given his tastes, preferences and resources (Reder 74), and, thus, there could never be anything involuntary (be it involuntary unemployment or involuntary supply restriction) and an equilibrium in existence at the same time. All in all, three assumptions must be made in the context of an equilibrium methodology: the existence of an equilibrium state is possible; the system at large will always spontaneously relent to an equilibrium; there might be more than one state of equilibrium (Gravelle and Rees 8). Moreover, by pursuing an equilibrium, however theoretically and ideally, we are tacitly acknowledging the possible existence of a state of (at least temporary) non-equilibrium, or *disequilibrium*, as some prefer (Reder 56). How often a disequilibrium would occur and how long it would last really depends on a range of factors, from what parties are involved, what activity is under investigation, and what we mean by “equilibrium”.<sup>215</sup>

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<sup>215</sup> In his book *Law's Order*, Friedman presented an example on barroom bullies versus pushovers, in which he demonstrated that with only one bully around and everyone deferring to his requests, there will be hardly any brawls, making the “occupation” of a bully appear profitable for some people. In turn, inspired by the potential profitability, some may want to join the “profession”, up to the point where the gains of instigating a tantrum or a fight just barely offsets the cost of getting hurt. This would be a point of equilibrium where gain and loss barely balance.

Now, let's turn our attention to the other front: the translation front. Intuitively, at least for the lay person, equivalence is purportedly at the core of translation, and translation is about nothing but seeking and finding an equivalent to express the same idea with in another human language. In reality, of course, it is never so simple. True, there are quite a few monographs dedicated to research on the concept—even making an institution out of it—of equivalence, Mona Baker's *In Other Words* being one of the prominent ones, and yet the idea of equivalence remains one of the most controversial issues in translation studies scholarship to this day. This is probably why Baker stresses in her work that equivalence should best be treated as a relative value (Baker 1992: 6). In fact, not only is translation not just about equivalence, at the same time the idea of “equivalence”—if it exists at all—is also unstable in that the meaning of the word can be volatile and loaded, heavily subjected to personal preference. In any case, we should now have a look at some “official” definitions of the term offered by translation scholars. In the *Routledge Companion to Translation Studies*, one of the leading subject-specific dictionaries of the field, equivalence means this:

A key concept in modern translation theory which defines the translational relationship between either an entire ST (*sic*) and a TT or between an ST unit and a TT unit in terms of the degree of correspondence between the texts or the text units. (Munday 185)

This sounds straightforward enough, but it does not answer every demonstrable question. True, the search for equivalence has been praised as the holy grail of translation for some time now, and yet over recent years, translation theorists seem to have come to terms with the fact that absolute equivalence, much less absolute identity (or “sameness”), is virtually impossible for translation, as every piece of translation has its weakness and strength scattered throughout unevenly and is thereby always open to “improvement”. Mona Baker even subtly denies the theoretical status of the term *equivalence* while acknowledging its broad use among frontline translators—mostly out of convenience (Baker 1997: 5-6). Any translator who takes upon herself to attempt true equivalence will probably find her efforts in vain in the end. The definition of the term is baffling enough as already demonstrated; the investigation of the nature and significance of it will be tougher yet (Baker 2008: 77).

That is probably what gave rise to a wide array of different forms/degrees of equivalence improvised over the years. Eugene Nida, for one, with decades of industrious work on Bible translation under his belt, introduced the ingenious idea of dynamic equivalence (as opposed to formal equivalence), among a few others. What Nida meant by “dynamic equivalence” is that, assuming that translation is an act of communication, the language chosen for the target text should ideally have the same effect on its native speaker recipients as the source text does on its native speaker recipients (emphasis mine) (Baaij in Glanert 107). The two texts (original and translation) must fulfill the same function without necessarily featuring the same word order or grammatical layout (i.e., textual alignment is unnecessary)—much less the same phonetic value. This type of effect could be called the “equivalent effect”, which, as Nida suggested, should be attained by means of adjustment devices such as addition, subtraction and alteration (Munday 186). Presumably, translation theorists are not ready to forsake the idea of equivalence altogether just yet, and a good many of them are still going to great lengths to defend it—at least for the time being. Hence the various forms of equivalence and the theories to justify them.

The will to adhere to equivalence does not end there. A sentence or phrase or any lexical unit, once considered an equivalent, will then undergo a value judgment, a process through which it is found either “good” or “bad” (Asad in Baker 2010: 14). In any case, the bottom line is, as Bassnett asserts, that equivalence does not entail a search for sheer sameness—far from it actually, as there will always be some loss and gain involved in the course of the change (Bassnett 36). It should act as a catalyst for a dialectic relation between the two seemingly incompatible categories of sign and structure within and around the two texts concerned (Ibid). And Popovic’s four types (linguistic equivalence, paradigmatic equivalence, stylistics equivalence and textual (syntagmatic) equivalence) and Neubert’s three components to the semiotic category of equivalence (the syntactic, the semantic and the pragmatic components) all do a great job in this respect (Ibid.). Thus, apparently, equivalence is no longer a synonym for unconditional sameness.

Before we go further into the comparison between equivalence and equilibrium, we should now have a candid and thorough discussion on what equivalence truly means for translation. True, while most people would probably have no trouble accepting and

believing in the untranslatability of figures of speech such as puns, jokes, metaphors and oxymora, or even slang (which is not really a type of figurative language but a language variety instead) across languages, they might not be fully aware that the logic behind the handling of these tropes should be the function of the saying or idiom used at a certain time and place—and in front of a certain addressee. Everything—and possibly everyone—should be seen, perceived and understood in their time and place. As a quick case in point, let's take the common French idiom *Il n'y a pas un chat* as an example. Obviously, the literal meaning of it would be “There is not (even) one cat (around)”. But upon further scrutiny, as long as the translator is a competent one aware of the idiomatic nature of this expression, he should realize that it (in most cases) refers to the deserted state of the place being observed at that particular moment, and thereby render it as something like “There is not a soul around”. Similarly, legal terms like *contrat* and *droit*, despite their resemblance in external lexical appearance, require special care when being translated (as do most word-for-word renderings), and can *hypothèque* be used as a safe and comfortable translation of the English word “mortgage”? Sadly, the answer would be to some extent, yes, but to another, probably not. Thus, business lawyers are often advised to take extra caution when dealing with problems of this kind when they are advising their clients on foreign law since appearances can be deceiving (Doczekalska 2013: 64).

For the sake of another argument, Eugene Nida, as presented above, distinguishes between formal equivalence and dynamic equivalence.<sup>216</sup> Formal equivalence simply requires strict conformity to the source text—in both form and content. Of course, as expected, formal equivalence works best for genres like poetry translation, which attempts to ply the reader with as much sensation and imagination from the source text as possible. On the other hand, dynamic equivalence has a focus on equal or equivalent *effect*, meaning the relationship between recipient and the message being conveyed should be as close as possible to that between the original recipient and the source text (Bassnett 33). Of course,

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<sup>216</sup> This is by no means the only classification of translation equivalence. The late Slovak translation theorist Anton Popovič, for instance, listed four types of equivalence: linguistic equivalence, paradigmatic equivalence, stylistic equivalence and textual equivalence, and translation should, in his view, observe a goal of “expressive identity” between the two texts. *Vide* Bassnett, 2002, p.32. At the same time, Kenny made a summary of a total of five different equivalence relationships: referential (or denotative) equivalence, connotative equivalence, text-normative equivalence, pragmatic (or dynamic) equivalence and formal equivalence. Arguably, the categorization of equivalence is probably just as complex and controversial as the concept of equivalence itself.

the convenience of dynamic equivalence centered on equivalent effect does come at a price, as it sometimes risks being misused beyond the scope of normal shifts that occur in the course of inter-lingual translation (Ibid.). More recently, Baker introduced some more types of equivalence in her monograph *In Other Words*, which, again, has been cited many times herein. In this work, she named all seven of her chapters with a certain type of equivalence, ranging from *Equivalence at word level*, via *Grammatical equivalence* all the way to *Pragmatic equivalence* (Baker vi-vii), and this all but proves how important a concept like equivalence is for translation.

Popovic's position actually goes a little further. Regardless of people's view on equivalence, one thing is for certain: no two translations of the same source text will ever be identical to each other, much less two back translations of the same source text. But there will always be a so-called "invariant core", as proposed by Popovič. This, I think, gives us the key inspiration for our analogy. In essence, the invariant core refers to a set of stable, basic and uniform semantic elements in the text "whose existence can be proved by experimental semantic condensation" (Spirk: 12). More importantly, an invariant core along with several variant features (elements) of the original will have a great impact on the translation—translation being basically a text, as not only does the invariant core have to be subjected to the translator's personal interpretation, it also has just as much to do with the multidimensional nature of the text (Spirk 12). As a general rule, the invariant core can be defined as anything and everything that exists in common between all existing translations of a single work (i.e., the greatest common factor) (Bassnett 33).

In any case, while I do accept equivalence as a general "benchmark point of reference" for translation, I do so in a reserved way that is similar to Baker's. In her work *In Other Words*, Baker claims that while equivalence could be achieved to some extent, stopping short of dismissing it altogether, it should always be treated as a relative, or relational, thing (Baker 6). Later on in her work, she stressed her point by reminding translators that equivalence, which could be at word level, phrase level, sentence level, paragraph level or even text level, should be observed and respected to a certain degree and on account of the text type with special consideration afforded to religious scriptures (Baker 112). While this position slightly deviates from that of Nida's, it still falls in the ballpark.

But, seriously, *just* religious texts? What about legal texts? With legal language being a sublanguage<sup>217</sup> with its own signs and “specialized grammar” (as was established previously), legal translation, the genre of translation that heavily involves legal texts drawn up in legal language, just might require a slightly different perspective on equivalence. If reportedly only fewer than 20% of adults (and presumably most *legal* translators fall into this category) in the US know how to give *informed consent* because the unique nature of legalese is making it hard for them to do so (Freedman 17), then it would probably not be realistic to assume that legal translators in general have sufficient knowledge of the legalese of both (or all) languages/legal regimes involved—much less be capable of producing target legal texts—that produce the legal effects expected—that feature at least some degree of alignment/equivalence.

What sets specialized translation, as a whole, apart from, say, literary translation, is the fact that individual terms (such as *discovery* (in civil procedure) and *liquidation* (in commerce)) take priority in specialized translation since each term denotes a very specific and technical idea/concept for the domain at issue, allowing little leeway for the translator as to the choice of terms. There will be dire consequences if they are handled properly. On top of that, the most fundamental difference between legal translation and other genres of translation lies in the official form it takes. Together these factors have fundamentally shaped the form and format of legal translation, where each and every term has a very specific meaning and/or referent to it. A quick example to this effect would be the civil law term *Rechtsgeschäft* or *acte juridique* or 法律行為 (lit. “legal act”), which would be better translated into English as “legal transaction” or just “transaction”.<sup>218</sup> Of course, the reverse may be true too; sometimes, considerably similar and comparable concepts may take the form of very different terms/words/phrases that may be dissimilar in orthography, syntax and/or morphology across languages<sup>219</sup> (Gémar in Glanert 77). Hence, notwithstanding the

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<sup>217</sup> Please recall that a sublanguage is a language used in a body of texts dealing with a circumscribed subject area [...], which is a subset, or a part, of the language as a whole. *Vide* Peter Tiersma, *Legal Language*, 1999, pp. 142-143.

<sup>218</sup> The term *act* itself does seem to exist in common law, as seen in cases like “wrongful act” (tort law), act of God (contract law and tort law), as well as *act* to mean a piece of legislation.

<sup>219</sup> For example, the term *rule of law*, a very American legal term, may be translated as *Rechtsstaat* in German and *estado de derecho* in Spanish, both of which have little in common in terms of morphological form with their English equivalent. For details, *vide* Gémar in Glanert, 2014, p. 77.

purpose of legal translation and the number of legal systems involved in the translation process, translation requires comparison of both legal concepts and legal terminology, urging some authors to claim that “[t]ranslation of legal documents is actually comparative law” (de Groot).

Thus, in an attempt to build a special case for legal translation, academics have proposed the idea of “functional” equivalence (Glanert 76-77). To boot, in order to compare, contrast and mix-and-match terms and concepts across language lines, a range of levels and degrees of equivalence would be indispensable that could help the translator ascertain the “conceptual gap” that is holding all relevant terms apart (Glanert 77). This may be of some use to legal translators.

The term “equilibrium” does not seem to appear in translation studies literature very often; in fact, surprisingly, I have found only one occurrence of it, and even then, it was used very indirectly—through a citation within a citation. Under the entry *Gender Metaphorics in Translation* in the book *Routledge Encyclopedia of Translation Studies*, the author of the section, Lori Chamberlain, while citing an analogy put forward by George Steiner that likens translation to erotic aggression, states that Steiner got this inspiration from anthropologist Levi Strauss, who considered social structures as attempts at dynamic equilibrium achieved through an exchange of words, women and material goods (emphasis mine) (Baker 2008: 95). Hence, apparently, not only is the concept “equilibrium” rarely pursued in translation studies, it seems to be used in a negative way in that translation is nothing but a phenomenon of verbal exchange that is manipulated by the power that be for the upholding of a traditional and powerful—and yet not necessarily legitimate—social hierarchy.

What do things look like in economics scholarship? Is the term “equivalence” ever mentioned at all? Luckily, it is—and to a considerable extent. For starters, in the *Oxford Dictionary of Economics*, there are at least three entries that are related to the term: “Ricardian equivalence”, “certainty equivalent” and “equivalent variation” (151). Then, upon further scrutiny, I noticed a more significant example of use of the term: “equivalence theory” in a book I have cited heavily in this research: *Law in a Market Economy* by Robin Paul Malloy. Basically, what the equivalence theory of markets proposes is that there is a

high degree of overlap between the pursuit of self-interest and the enhancement of public interest, on the assumption that, under perfect competition, where there are not supposed to be any externalities whatsoever—positive or negative from regular market exchange, all actors act rationally, and they also act in their own self-interest, and they are armed with complete and valid information and all goods are freely transferable (Malloy 27). This means that self-interest and public interest correspond with each other, and when economic agents pursue their own interest, they will end up contributing to the public interest—with or without their knowledge (Ibid.). My understanding of equivalence theory, in very plain words, would be that private interest and public interest are “equivalent” to each other in many cases, and the pursuit of one entails the pursuit of the other. In fact, this proposition can be traced all the way back to Adam Smith’s invisible hand theory for its origin.

In yet another scenario (this time the economics context), equivalence, a concept based in time value, generally refers to the correlation between the present value and the future value of a good or service. In mathematical terms, the function  $[P/F, i, N]$  = present value given future value  $F$ ,  $i$  and  $N$  can be expressed as  $P = F/(1+i)^n$ <sup>220</sup>, where  $P$  stands for the present value,  $i$ , the interest rate (or inflation rate, whatever the case may be),  $F$ , the future value, and  $N$ , the number of periods (usually in months or years). Or, reversely, the future value of today’s investment can be calculated with this formula:  $F = P(1 + i)^n$ . For example, the future value factor for a loan with an annual interest rate (or investment return rate) of 5% over five years would be  $(1 + .05)^5 = 1.28$ , meaning the future value of 100 euro today will become 128 euro in five years’ time. Or, reversely, if we want to shoot for a certain amount, say 100 euro, in five years’ time, then, at a return rate (or interest rate or inflation rate) of 5%, this is how much money we would have to invest right now:  $100 / (1+5\%)^5 = 78$ . What this demonstrates to us is that basically, the time value of money is the idea that today's dollar is worth a different amount than tomorrow's dollar, or to put it more generally, the value of a certain thing can fluctuate (higher or lower) from a certain base point (usually a base year or a base quarter). Today's one dollar could be invested to earn interest on stocks or bonds, making it worth more (or less, depending on how sharp an investor one is) tomorrow. One can also use that dollar to buy a dollar's worth of

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<sup>220</sup> The divider of this formula should be read out loud as “one plus the rate of interest to the nth power”.



goods/services today, but that same dollar probably won't be able to buy the same amount of things in the future because of inflation. The long-held view, of course, is that, as a general rule, a dollar today is worth more than a dollar tomorrow. Maybe so, but exactly how much more? Apparently, of course, the appreciation (or depreciation) of a certain good or service will depend in large part on the *rates* involved, be it the inflation rate, the return rate, the interest rate or a combination of these.

Hence, there seems to be some common ground shared by the “equivalence” in the economics context and the “equivalence” in the translation context. In translation studies, while equivalence—dynamic equivalence to be precise—is about an intangible bridge that is supposed to link up a source text (which has an author) and a target text (which is a write-up by the translator) in a dynamic way in the sense that the two texts share one very same *effect* in their respective readership. Next, in the land of economics, equivalence in monetary value refers to the comparable nature of two amounts (usually amounts of money) over a period of time in terms of buying power (in the case of money) or “bartering power” (exchange power, in a way) (in the case of other goods and services)<sup>221</sup>. And whenever two amounts are regarded as equivalent in this sense, it means that they have the same commercial or economic effect in that they can entitle the owner to the same amount of goods and/or services at two different temporal points (but at the same locus). In this sense, then, a given amount of money, say 100 euro, can be understood as having the *equivalent effect* in both points in time in exactly the same way as a translation being understood as *dynamically equivalent* for having the same effect in both languages/cultures (which is what Nida meant by “dynamic equivalence”). In contrast, the claim that a given amount today, again, say 100 dollars, will be equivalent to 100 dollars anytime in the past or in the future... tomorrow, yesterday or even five years from now, will be a claim of formal equivalence, where equivalence is embodied in the strict correspondence between the two texts in both form and content. It is certainly startling how the underpinnings of one translation theory can work in the context of economics.

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<sup>221</sup> Payment does not always have to come in the form of cash. Bartering opportunities are plentiful in the business world, and businesses (especially start-up businesses) do engage in them every now and then.

Furthermore, what about equilibrium and equivalence? Luckily, there seems to be some common ground between equivalence in translation and equilibrium in economics, and, as such, equivalence, the value so cherished traditionally in translation studies scholarship can serve as an ultimate embodiment of the value of equilibrium, which is of a spiritual nature and of a higher order. While never having really dismissed it altogether, translation theorists, as we know it, have long distanced themselves from a strict adherence to equivalence, which gave rise to the many types/genres of equivalence developed by the many translation theorists during the last century such as Nida, Popović and Neubert, and which also marked the several stages throughout the history of translation studies including the linguistic stage, the communicative stage, the functionalist stage and, most recently, the aesthetic/ethical stage. In short, the diversity in our approach to the translation phenomenon that we are seeing today undoubtedly has a great deal to do with the very simple and basic idea of equivalence.

In economics, as has been previously emphasized, an equilibrium state is generally regarded as the final, ultimate and “advanced” state, and an economic model would probably be derided as “incomplete” if it fails to eventually arrive at an equilibrium, towards which all operational forces in the model can converge, typically an end state where no actor would have the incentive to make or the capability of making any changes (Rauch 5). This is because economists, as staunch believers in stability and rationality, are constantly in search of something permanent and stable—at least for the long-term, and, in many cases, an equilibrium happens to be that sought-after ideal and objective. As a matter of fact, the value of equivalence in translation, exists as a preliminary stage of equilibrium, a distant and remote objective where all forces are balanced and nobody needs to change their behaviour or position just to be better off, not because they do not want to but because no improvement would be possible (at least not without the joint action of a large number of agents). In recent years, translators have, in fact, as shown in my arguments herein, been moving away from strict adherence to equivalence to other perspectives (function, aesthetics, ethics, purpose, physical appearance, phonetics...) and then on to descriptive translation studies (DTS) little by little, and all their efforts seem to point in one direction: a better balance of power and interest based on adequate ethics, i.e., a better *equilibrium*—in a way, among all parties concerned—the author, the publisher, the target reader, the larger

target culture, and of course, the translator himself, treating translation as a stand-alone, integral, self-consistent and interrelated system—a system that is not too different than an economy though smaller in size maybe. This tendency, which features an endless struggle between disequilibrium and equilibrium, can be seen at virtually every stage of development in translation studies: in the theory of translation as a grammatical and lexical transfer of signs as proposed by de Saussure and Jakobson, in Nida's dynamic equivalence, in Vermeer's *skopos* theory and, of course, even in Toury's DTS. All these propositions and the values and perspectives they implicate, be it simple and formal equivalence, meaning and grammar and signs, function and functionalism, culture and effect, as well as norms and patterns as established and observed by translators, all aim for an ultimate and perfect thing: equilibrium.

Translation, evidently, is often in a state of disequilibrium, and the translator is to take a proactive role in bringing equilibrium to it all, with equivalence being one of the many benchmarks indicative of a true equilibrium. Equivalence, therefore, gives the translator something to aim for and “munch on”, and, to boot, equilibrium provides a model of equivalence in the most ultimate and primitive form for the translator at every stage, on every decision and also vis-à-vis every party. While I am not dismissing the value of equivalence in translation altogether, equilibrium, in my opinion, goes way beyond equivalence in terms of both scope and importance, as equivalence concerns itself mostly with the relationship between the two texts and nothing else.

#### **D. Specific Practices in Translation through the Prism of Economics**

In this section, I would like to run a total of four very common translation practices through the prism of economics, thereby showing how the use of economic methodology and economic thinking can be extended across all corners of legal translation. They are term banks, co-drafting, jurilinguistics and legal transplantation, which were all selected for their relevance and significance. The reader should be advised, however, that while the four activities are passed through the prism of economics, economics may not be relevant to all of them in the same way, nor to the same extent.

1. Term Banking: Embodiment of Economic Efficiency or Path to Natural Monopoly? Typically, a terminological bank, or simply a “term bank” for short, is a huge database in which terms or multi-word lexical units are kept, listed, ordered, glossed and categorized in a certain way meant for universal referential use. Typologically speaking, a term bank can be regarded as a type of terminological dictionary, and it can be either paper-based or electronic. Term banks are particularly useful for translators, who oftentimes need to look up an unfamiliar term for all its possible equivalents and preferably one that is widely accepted or even standardized, in another language rapidly. As such, a term bank, expectably, has a rather clear and stable group of intended users, who normally belong to one of these three categories: language professionals, academics, experts and students of a specific domain and other professionals working with or within the domain (e.g., salespersons and technicians) (Meyer and Mackintosh 260). Due to the exclusive nature of terms (NB: not “words”) that are included in most term banks (terms of a specific and specialized domain), as well as the format in which they are organized and laid out that is decidedly different than that of a conventional dictionary (e.g., entries do not normally come with complete example sentences), they might not be recommended for ordinary L2 foreign language learners as bilingual dictionaries, at least not for L2 beginners, who should otherwise be consulting a dictionary (monolingual or bilingual) for a glossary of new vocabulary. In fact, some term banks even show an explanatory remark advising users—especially foreign language beginners—not to treat the term bank as a comprehensive dictionary covering the general vocabulary that provides readers with relevant sentence examples.<sup>222</sup> This is partly because a term record (which is technically an entry) in a term bank rarely has features that L2 language learners need most, such as pronunciation labels, grammatical inflections (this includes verb conjugations and noun/adjective declensions), and rarely any related phraseological units, which, by the way, are referred to collectively as “phrasemes” by some, such as idioms and idiomatic

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<sup>222</sup> The Irish term bank *Tearma* is a notable example in this regard. On its homepage, it explicitly forewarns its users that, as a terminology bank, it does not provide general words or translations of complete sentences. It even directs readers who need a quick translation of a specific term to an online bilingual dictionary: Foclóir, which is sponsored and administered by Foras na Gaeilge, the government body in charge of the promotion of the Irish language. Please refer to their website at [www.tearma.ie](http://www.tearma.ie) and then put in a word—any word—for an equivalent in Irish in the form of a term record, in which such a remark can be seen.

expressions (e.g., the idiomatic expression “head over heels about someone” would probably not be included under either *heel* or *head*), phrasal verbs (such as “take good care of”) and word/phrase collocations. Some term banks, though, notably Canada’s Termium Plus, do include a great amount of acronyms and initialisms along with their respective full titles in addition to their equivalents in the other language(s), and some even include the definitions of highly specialized and technical terms (e.g., “metastable allotrope” in chemistry).

Currently, there are a few term banks across the globe that I find particularly comprehensive and authoritative, and they are the Interactive Terminology for Europe (IATE)<sup>223</sup> of the EU, Termium Plus of Canada, *Le grand dictionnaire terminologique* (GDT) of Quebec and TERMDAT of Switzerland.<sup>224</sup> On a smaller scale, there is also *Euro Term Bank* (ETB), a private-run term bank that is more focused on the languages of the few recent members of the EU, as well as *NATOTerm*, the term bank administered by NATO serving the purpose of standardization of terms across its member states. Of course, understandably, these ones largely feature domain-specific terminology only. To my delight, there is also one for the Irish language (this one administered and regulated by Foras na Gaeilge), and it is entitled the “National Terminology Database for Irish”<sup>225</sup>, developed by Fiontar & Scoil na Gaeilge, DCU, which is responsible for all technical support. In addition, several multinational agencies and bodies (mostly affiliated with the UN), such as ITU, WTO and IMF, have their respective domain-specific term banks too. Not surprisingly, the majority of these major term banks are funded and run by officially multilingual jurisdictions and organizations.

While term banks are helpful for the translator and, to a lesser extent, the general public, who want to stay up-to-date on the vocabulary of the languages they are working on that are constantly evolving and ever-changing, they, nonetheless, aim to serve one very important function besides quick referential assistance for translators: the standardization of

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<sup>223</sup> EURODICAUTOM, the predecessor of IATE, was abolished and officially taken over by IATE in 2007.

<sup>224</sup> Of course, one could easily argue that search engines like *Google Translate* qualifies as a term bank, but such a claim would be highly debatable.

<sup>225</sup> The database is accessible on their website at [www.tearma.ie](http://www.tearma.ie). Please note that, interestingly, they do not call it a term(inology) bank. At the same time, an online bilingual and bi-directional English-Irish dictionary has been created by Foras na Gaeilge under a dictionary project called *The New English-Irish Dictionary*.

terms for translators working on the particular language pairs that are supported by the term bank. In this sense, understandably, efficiency would be the key value, as oftentimes frontline translators find themselves in need of a quick answer to some baffling terms/lexical units they come across in their everyday line of work. However, at the same time, being capable of streamlining the search process for constant and uniform results, will term banks, however well-intended, incidentally have the effect (or “side-effect”) of encouraging a natural monopoly for specific translation pairs and combinations, thereby spelling an end to context-specific rendering of words and terms that arguably work best on a case-by-case basis? The quick answer seems to be affirmative. For example, if the term *child labour* is “supposed” to be translated as “travail des enfants” in French as demonstrated by IATE<sup>226</sup>, then the term bank is apparently trying to impose on the French-English translator a certain “authority” of equivalence, while, in fact, there could be some other possible rendering that may make just as much sense, as shown by TermiumPlus, Canada’s most authoritative term bank (such as “main-d’œuvre enfantine” and, in a slightly different sense, “travailleurs juveniles” ). Since legal translation depends highly on context and collocation, and since a tiny nuance across a language pair may yield a fatal effect, one would expect the rendering of a particular legal term to be extremely professional and precise, leaving little latitude to the editor or the compiler of the term record in the term bank.

Just like a common law judge following a legal precedent as per the principle of *stare decisis*, the legal translator is often expected to follow certain widely accepted choices with their rendering of terms when handling a legal document or a piece of witness testimony—and for good reason. Unbeknownst to many translators, who seem to just take it for granted, this practice actually does have a very economic aspect to it. Under *stare decisis*, the judge would follow a precedent that he believes to be sufficiently comparable to the case at hand. This, in fact, has two chief implications: first of all, it would contribute to the stability of the function of the legal system thereby adding to its supremacy and nobility;

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<sup>226</sup> In all but one (in which case it is rendered as “exploitation des enfants”) of the 19 term records that involve the English term *child labour* that I was returned, the term is rendered as “travail des enfants” in French. By comparison, on TermiumPlus, the same term is given a total of three “equivalents”: “travailleurs juveniles”, “main-d’œuvre enfantine”, as well as, of course, the all too familiar “travail des enfants”, all with a “correct” label that serves as proof of official endorsement.

secondly, it would also encourage future judges to adopt similar interpretations of the same laws, principles and doctrines and imbibe future generations with similar thinking, thereby saving all legal professionals a great amount of time and trouble (Reder 360).<sup>227</sup> In this sense, in passing, the entire corpus of common law can be thought of as a database, or a “case bank”, despite the absence of this term on the official stage, that legal professionals look at and look into for precedents that will work for their case. In addition, whether this constitutes “path independence” or not, believing in what others believe in will likely generate an impression of credibility—at least from a sociological point of view (Ibid.). A concern like this is very economics-like in nature indeed. By virtue of simple analogy, the legal translator will, by “following in the footsteps” of forerunners of the profession by consulting a term bank for assistance with terms/expressions/phrases that have won wide recognition—presumably even among those forerunners—will not only save himself a great deal of time and energy, but will also give the target reader a more professional and non-arbitrary impression. Simply put, the legal translator and the judge are both searching for precedents that will apply to the case they are currently working on; the major difference is that the legal translator is searching for the right rendering of a legal term (preferably from a law database like *Juridictionnaire* ) while the judge would be in search of prior cases from all common law jurisdictions then and now that he believes will strengthen (or weaken) a certain position in connection to a question of law.

For its part, Termium Plus is a comprehensive terminological and linguistic data bank run and administered by the Translation Bureau of the Government of Canada. It started out with only term records in the two official languages, French and English, and it is now rapidly expanding into Spanish and Portuguese, both Indo-European languages widely spoken across the Americas. Currently, Termium Plus is arguably one of the most renowned and reputable term banks recognized by translators worldwide. Under its administration is *Juridictionnaire*, a database, or a “compendium” by its own admission, of the difficulties and expressions in the French legal language.<sup>228</sup> This jurilinguistic work is a

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<sup>227</sup> Please take note that, once again, as mentioned earlier, this in no way implies that civil law judges never follow prior cases; actually, they do, but just in a different fashion. However, a full description of this insight will deviate from the mainline of this research.

<sup>228</sup> <http://www.btb.termiumplus.gc.ca/tpv2guides/guides/juridi/index-eng.html?lang=eng>. Accessed 05 September 2017 at 11:18 a.m. (UTC+8).

helpful tool, filling the legal translator's need for quick translation and writing guidance, as it helps solve the many translation problems arising from the distinctive nature of legal language, bijuralism, the co-existence and interaction of common law and civil law, and the influence of common law on Canadian public law and its language. Moreover, by the way, all term banks and the purposes they serve (standardization being the most important one) form part of a larger language policy, usually at the government level, central or local. Moreover, by the way, language planning and language reform are usually part of a larger language policy, which is invariably part of the politics maneuvered by a current power in an attempt to substitute, if not uproot, a former regime. As demonstrated by Kemal Atatürk shortly after he founded modern-day Turkey, language reform is mostly a sociopolitical, instead of a linguistic and cultural, process seeking—on the part of the prevailing political force—to leave behind a legacy on future generations (Dogancay-Aktuna 7). Seen in this light, a term bank, which is supposed to facilitate policies like terminology standardization and orthography reform, is not at all as innocent as one might think.

Termdat is the Swiss term bank with roughly 400,000 term records in it that is administered by the Terminology Section (la section de terminologie) of *La Chancellerie fédérale* (Federal Chancellery of Switzerland) that features five languages (the four official languages plus English). In addition, on its introduction page, it makes no secret of the fact that its term records are composed and collected primarily for the sake of federal legislation that pertains to a wide variety of fields, including but not limited to education, energy, finance, commerce, industry, culture, agriculture, defence, environment, transport, economics, and, as such, it can only guarantee the inclusion of acronyms from Switzerland and some international organizations (most of which are based in the country), as well as legislations and law bills from Switzerland both at the federal level and at the canton level.<sup>229</sup> In addition, not all term records are complete in all five languages, and, due to its relatively small size with a small amount of entries, terms/lexical items from certain domains (such as anatomy and biology) remain severely underrepresented, if not outright absent. This may appear anomalous for a country that considers itself among the most egalitarian worldwide. As stated previously, since the days of Schleiermacher, there has

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<sup>229</sup> <https://www.bk.admin.ch/themen/sprachen/00083/00854/index.html?lang=fr>



always been a clear distinction between translating literature (fiction) and translating scientific language (non-fiction) in translation studies circles. This has set the basis for a distinction of aesthetic translation and pragmatic translation proposed by some translation theorists (Bédard 177), and, apparently, legal translation belongs to the latter category, as it places less stress on the aesthetic form and style of the source text than on the contents. While an analogy from law and economics for translation studies may appear outlandish to many at first, the truth is that, in their routine line of duty, legal translators are constantly forced to “make the call” in the face of a multitude of possible choices, and part of the pressure (or relief, depending on how one looks at it) comes from term banks. Gémard thinks that a legal term, which is an explicit summary of the complex history of a legal institution or legal concept in either the target language or in the source language, is volatile in that it might have several shades, some of them subtle, of meanings. This will inevitably require that the legal translator conduct a series of comparisons between the two languages in terms of a certain set of features (emphasis mine) (Gémard in Glanert 75). And whenever one is comparing things, they are inevitably evaluating an array of choices against a set of criteria for the sake of utility/profit maximization, which will incidentally invoke economic thinking. Moreover, admittedly, legal translators sometimes find themselves in a situation where they have to settle for a second-best solution when all else has been exhausted and failed. In this sense, all legal translators are economists who know how to conduct economic calculation through give-and-take and hit-and-miss strategies in their everyday line of work. In a case like this, the resulting opportunity cost to the choice that had to be adopted would be very high indeed.

One of the primary motivations for any human action is the pursuit of authoritative influence over the process of cultural interpretive framing, referencing and representation (Malloy 64). What this means for us is that the translator, as a rational and self-interested individual engaging in strategic behaviour, always has his own “hidden” agenda to pursue when ostensibly carrying out tasks “entrusted” or “assigned” to him. At worst, the agenda may well be an ideological one, or it might be something as benign as an aesthetic agenda, or it all simply boils down to personal preference and/or random choice. In any case, one thing is for sure: the legal translator is opting for the choice that brings him the greatest profit/utility. To put that into perspective, according to Malloy, the process of legal

translation is a process of framing, referencing and representing that transforms meanings and values, and the ability to influence these cultural-interpretive connectors stems from self-interest (Malloy 65). This influence that is being sought after by the translator is important because it enjoys great clout over the generation and allocation of resources (Ibid.). If this is indeed the case, then is the translator not being heavily influenced by some outside force at the same time, like a term bank compiled and “recommended” by the government or the powers that be? And if so, does it not “ring a bell” of monopoly or some other similar market type?

Thanks to its ubiquitous occurrence in mass media, monopoly is probably one of the economic terms that the lay public is familiar with. A monopolist is, in plain and simple words, a single supplier of a good or service (Hylton 1). On the surface, this definition looks innocuous and value-free. However, it is also too simple to be practical, as the term *monopoly* is not univocal in its meaning; instead, one should focus on the market condition, realizing that the crucial feature to a monopoly should be the absence of competition from any competitor firm (Ibid.). More specifically, there are two major categories of monopoly: firms that become dominant by winning out as the one with the lowest prices and/or best trade conditions as the result of fierce competition, and firms that obtain exclusive franchise from the state, usually backed up by some law or regulation, as is the case for most petroleum companies (Ibid.). Coincidentally, in economic parlance, a term bank is similar to a firm providing terminological service in the translation-editing-terminology assistance and support market, which seems to constitute a monopoly in a way in that it is usually state-owned and also devoid of competitors. Arguably, its *raison d'être* is this: convergence through government towards a natural monopoly for the efficient use of resources. While it is common belief that competition spurs innovation and productivity, a natural monopoly is a form of market in which production is characterized by increasing returns to scale (or IRS) because ultimately only one firm will be able to survive in the market with all others going out of business because of faltering performance (Leach 219). In addition, there is strong consensus in economics circles that natural monopoly is often the result of an economy of scale accompanied by considerable network externalities (Friedman 2000: 260-261). The two most key attributes of a natural monopoly are the drop in average cost as output increases and an exceptionally low marginal cost that is always lower than the

average cost at any point of output (Ibid.). Why a natural barrier may, in many cases, ultimately lead to a natural monopoly is beyond the scope of this research, but, for the sake of argument for the moment, increasing returns coupled with a constant decline in average cost often result in only one firm surviving in the industry in the long run. Typical natural monopolies include industries like railway, tap water supply, electricity/power supply and the post office. In the vast majority of economic theory literature, one could easily encounter economists or business owners arguing that unrestrained competition would lead to destructive and devastating competition—or, worse yet, cannibalism—leaving only one firm alive in the long run, which will then be able to charge outrageous monopoly prices regardless (Hylton 17). While monopoly might not have a good reputation, a natural monopoly is different; there have been many economists supporting natural monopolies, arguing that services like utilities and postal service are destined to become natural monopolies because of the efficiency guaranteed by their economies of scale (Friedman 1996: 141).<sup>230</sup> And, as the argument continues, they should at least be allowed to form a cartel with each other even if a natural monopoly is out of the question under the current political climate. Anyhow, natural monopoly is often the point at which bold criticism of monopoly starts to peter out in a discourse on economic efficiency.

Now, in light of the definitions and basics of a monopoly and of a natural monopoly, could a term bank, say, Termium Plus, the term bank operated and funded by the federal government (the Translation Bureau, to be exact) of Canada, be considered a firm operating in the Canadian terminological service market that enjoys monopoly status? If not, then what about oligopoly? Could Termium Plus and the GDT, the term bank run by Quebec, be considered two firms that have formed an oligopoly in the French-English term/phrase translation market?<sup>231</sup> Justifiably, the primary accusation made of a monopoly is the inefficiency it is likely to entail. As long as the seller is selling a product/service at a price well above cost and turning a substantial profit, buyers who value the product at more than

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<sup>230</sup> Of course, like most claims made in the social sciences, this claim is controversial. Whether or not free competition will eventually lead to natural monopoly simply because the largest firm is able to produce and sell at a price above its own average cost but well below the average cost of all smaller firms, thereby profiting from an economy of scale is truly an open question.

<sup>231</sup> The reader should be advised, however, that what is being referred to here has more to do with who should have the final say on how specific terms/phrases should be rendered between two official languages, and it has less to do with the physical translation service market, since both term banks are government-owned with most of their services provided free of charge to the general public—mostly in electronic form.

its production cost but less than its actual selling price will not be able to afford it, which results in an inefficient outcome (Friedman 2000: 245). What's more, it might not even be in the seller's best interest either, as some products/services would never get purchased from the firm, resulting in a waste of resources, not to mention that, surprisingly, unprofitable monopolies (even natural monopolies) do exist, as has been proven time and again by firms like the United States Postal Service, Amtrak, An Post and Via Rail Canada, just to name a few out of thousands, if not millions, around the world, which, ironically, require heavy government funding to stay alive (Throwing good money at bad?). What this means for legal translation is that "granting" government-sponsored term banks a monopoly on how terms and phrases should be translated might not be a good thing, unless, of course, the industry of term banking qualifies as one that inherently necessitates a natural monopoly, in which case the efficiency or inefficiency thereof would deserve some reconsideration.

Another point of reference would be oligopoly—a "watered-down" form of monopoly<sup>232</sup>. Have the relatively limited number of term banks around the world, mostly state-owned, formed an oligopoly or a cartel among themselves—however tacitly? Put another way, have they formed an alliance among themselves either to keep would-be translators and/or terminologists out, or to have a monopoly on how terms should be translated or other aspects of language activity (such as orthography), or just the practice and profession of translation in general? To answer these questions, we need to look further into the two concepts of "cartel" and "oligopoly".

A cartel is a group of any number (theoretically, at least two) of firms that are seeking to increase—and retain—profits among themselves by restricting price and/or output competition in the form of a collusion (Hylton 68). More specifically, it is an alliance among firms in the same industry engaging in restrictive practices, which typically include price fixing (Let's all agree to sell at 60 dollars a barrel!) and/or output restrictions (And no more than one million barrels a day, all right, folks?). It is no secret that the international petroleum organization OPEC (The Organization of the Petroleum Exporting Countries) is

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<sup>232</sup> Some economists list duopoly, the form of market with only two firms, as a separate form of market competition, but here, for the sake of conciseness, I will just treat duopoly as a special form of oligopoly that deserves no special attention.

a typical producer's cartel backed up by prevailing international politics of the day. Admittedly, cartel agreements are very common in many industries across the globe, and they are by no means a modern-day practice. Of course, needless to say, enforcement of a cartel agreement would be another hot-button issue, as history has revealed time and again that parties to a cartel can and do cheat, making the agreement unstable and unreliable and the dynamics among all members awkward at times. This has been modeled into a payoff matrix as a game in economics literature, showing the incentive to cheat on the part of individual firms (Hylton 69). As Friedman points out, one major weakness of a cartel is that it is probably better to be out of it than in it (Freidman 161), and the ones that would benefit most from a cartel are usually the largest firms, which are, in most cases, on the brink of becoming diseconomies of scale anyway.

Now, coming back to the question brought up a few paragraphs ago, what about an oligopoly? While the word *oligopoly* literally means "competition among the few", it is probably best to define it in terms of the nature of the competitive relationships among sellers (Gravelle & Rees 400). Given the close interdependence among a small number of competing firms, the possible actions of all other competitors (say, by the way, are they friend or foe?) must be taken into serious consideration when formulating a decision. Since different hypotheses on what a potential competitor would do entail different predictions of the market equilibrium, we will end up with several possible theories with dissimilar solutions. However, the application of game theory to oligopoly theory has led to a revolutionary perspective on this paradigm. A cartel agreement to collude in business might be strictly adhered to by all parties (in which case it would be referred to as *self-enforcing*) even in the case that the agreement is not legally binding. This is especially obvious in a repeated game (as opposed to a one-off game). Why is this? The focus of game theory is on the decision-making process of the individual participants, and game theory was originally designed specifically for the analysis of games with a small number of players with little room for market clearing as regards the determination of an equilibrium point (Reder 284).

In an oligopoly, absent a cartel agreement, which, by the way, is not inherently illegal or unenforceable in most jurisdictions, there can be another way out that works towards the same effect: conscious parallelism. Conscious parallelism is a pricing strategy adopted

among competitors in an oligopoly that occurs without an actual agreement between the players. This is how it usually works. One firm will “take the lead” in raising or lowering prices, and the others in the same market will then follow suit, raising or lowering their prices (or altering trading conditions accordingly) by roughly the same amount, with the tacit understanding that everyone will benefit from greater profits (Hylton 75). Price matching, often hailed as a normal marketing strategy, is essentially a form of conscious parallelism. Apparently, conscious parallelism leads to tacitly collusive behavior, which may lead to a price and output level close to those in a monopoly market. Sadly, something like this could be a real possibility even in the absence of an express agreement.

From another perspective, there are just a handful of firms (parties) in an oligopoly, each of them with relatively mighty leverage over the others, and these firms are thus most likely to engage in a collusive agreement among themselves. Also, all firms involved are highly interdependent despite the lack of a “conspiracy agreement” in black and white, which would otherwise be illegal under anti-trust laws. Therefore, understandably, oligopoly has become one of the largest areas of research in applied game theory, because strategic interactions among oligopoly firms are most worthy of an investigation as a game.

And does this scenario not resemble that of the global terminology bank market today? For the sake of quick reference, the Swiss term bank TERMDAT, which was mentioned previously in this chapter, makes no bones on their official website homepage about their “full cooperation with major foreign term banks”, especially IATE (the EU term bank), the terminology commissions of France (notably *La Commission d’enrichissement de la langue française*) and RaDT (*Rat für Deutschsprachige Terminologie*) of Germany.<sup>233</sup> Again, this was never by chance, and it certainly reeks of suspicion of a global oligopoly or a cartel of translation services to me.

In sum, for better or for worse, the word/phrase rendering services as a tool for translators may have already formed a quasi-monopoly market both at the local level (say, in the French-English translation market in Canada) and on the global level.

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<sup>233</sup> <https://www.bk.admin.ch/themen/sprachen/00083/00854/index.html?lang=fr>. Accessed on 11 May 2017 at 12:16 pm (UTC+8).

## 2. Co-drafting: The Better Choice?

*La corédaction en Suisse serait-elle un paradoxe?*

Bertagnollo and Laurent in Gémard and Kasirer 123

In light of the many alleged shortcomings to legal translation, where at least one version is the original and at least one other being a non-original, jurists and translation theorists have done everything they can to seek out ways of granting equal status to all language versions concerned. Indeed, languages are essentially systems reflecting different varieties of the human condition (Edwards 90), and this would be more so for different legal languages, making translation hard and legal translation even harder. Also, presumably, co-drafting (or any non-translation mechanism) prevents the dilemma of “Which version came first?”—something that legal translation will never be capable of, thereby giving all versions equal status, and it thus primarily emerged out of political concerns. But much as their efforts should be appreciated, is co-drafting really a better choice? Will it really contribute to a seamless—and equitable—alternative to translation?

To begin with, let us take a look at what co-drafting means. In an effort to steer clear of the politically sensitive question “Which one is the original and which ones the translation?”, the Department of Justice of Canada has embarked on an endeavour to produce two originals of the same legal document, through which neither version is a mirror image of the other, in the course of legislating, and quite impressively too (Šarčević in Gémard and Kasirer 279). Co-drafting is unique because in the course of a co-drafting process, both texts are considered original in the sense that neither one is considered merely a mirror image, or a “translation”, of the other one. In more professional terms, co-drafting is a way to generate two “equal” versions of the same legal instrument that reflects “linguistic purity within the confines of legal equivalence” more than it does grammatical and phrasal parallelism (Šarčević 282).

Essentially, co-drafting is a legislation drafting process that incorporates the translator into the drafting process (Ibid. 280), and the translator is thus “promoted” to the status of a co-drafter. Co-drafting has proven that legal writers can produce a text that meets a linguistic

community's socio-cultural and linguistic expectations, and because co-drafting places the two texts on an equal footing, it would meet people's hope for free expression and a democratic *modus operandi* (Gémar in Glanert 80). This is precisely what legislative bilingualism means for Canada, a country with two legal systems and two official languages/cultures (at the deferral level), and it is also what supplies the fertile soil for legal translation research in the country.

One should take note, however, that both translating and co-drafting come with their inherent merits and demerits, and neither could work better than the other in every way. Also, one should be aware that the idea of co-drafting is understood and practiced differently in Canada and in Switzerland (where the Canadian-style co-drafting is called 'parallel drafting'), as we will see soon. In Switzerland, for example, since there is only one legal tradition involved (with cultural ramifications in French, Italian and German), diversity is appreciated for clarity and not as a means in itself (Šarčević in Gémar and Kasirer 288). Co-drafting requires some related processes such as co-editing, and Canada and Switzerland are widely recognized as two examples that are among the best of the best in this regard. We will now discuss them in more detail.

First of all, why Canada when it comes to research on co-drafting? There is no question that French-English (the languages) relations have remained one of the central themes of Canadian history (Fraser 13). On top of that, the bijural nature of the Canadian legal system, which dates back to when the British and the French both occupied the same territory at the same time long before the beginning of confederation, along with the obligations that derive from Canada's official stance on bilingualism, has had a significant impact on the drafting of federal legislation. In this sense, federal legislation needs to speak to Canadian citizens in a language that acknowledges, in both English and French, the common law and civil law legal traditions. As it happens, then as now but more than ever before now, co-drafting has been a source of inspiration for bill drafters, jurists and legal translators all over the world, and no longer just in Canada, and it has undoubtedly served as a powerful inspiration source for bi-/multilingualism in Canada, in Switzerland, across the EU and even beyond.



Language has always been—and will remain—at the heart of the Canadian experience. In fact, language rights in Canada have come a long way since the founding of Upper Canada and Lower Canada by Britain following the Treaty of Paris of 1763 that marked the end of the war between Britain and France over their North American colonies. The defeat of the French by the British did not, however, mark the end of French culture in modern-day Quebec. In the debate over the *Quebec Act* of 1774, Britain made it clear that while they would be assuming full sovereignty over Quebec, they would not be imposing their language, their religion or their legal system on Quebec, and the *Quebec Act* was to provide that existing French law (*jus commune*) would continue to apply to matters of property and civil rights within the Quebec colony. In other words, from the very outset, Quebec was to be left intact in regard to aspects such as language and law<sup>234</sup>. During the 1830s, John George Lambton, better known as Lord Durham, proposed an assimilation policy for a solution to tension over language. While the *Constitution Act* (British North America Act) of 1867 provided that both English and French were to be used in Parliament, the unspoken rules in the relationship was clear: since everyone that was prominent enough to get elected to Parliament was assumed to know the English language, the country and its Parliament would function in English. In light of these ongoing circumstances, George-Étienne Cartier, one of the Founding Fathers of Canadian confederation, predicted that Canadian federal politics would forever center on Quebec, with the relations (or tensions, depending on one's political stance) between Francophones and Anglophones making up the permanent theme (Fraser 2006: 20). Since then, the French have put up a redoubtable defence of their existence, polarized around the Catholic Church, French civil law and the continued use of the French language (Ostler 415).

And he was right. Starting in the 1960s, a social movement known as the “Quiet Revolution” (*La Révolution tranquille*) started to gain ground first in Quebec before spreading into the rest of Canada. Language rights being one of the key causes for this movement, it ultimately led to the enactment of the *Official Languages Act* of 1969, which guaranteed equal status, equal rights and equal privileges for both official languages and

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<sup>234</sup> The Act stipulated that while French law would continue to govern civil matters, it would be superseded by English law in public law matters, thereby incidentally providing Canada's bijuralism with its primitive foundation.

their speakers at the federal level. The 1982 adoption of the Canadian Charter of Rights and Freedoms, Canada's *de facto* constitution, and consequent changes in the British North America Act of 1867 still raised the question of French- and English-language education policy. The revised version of the Official Languages Act of 1988 reaffirmed the federal government's commitment to bilingualism by finally bringing federal language policy into line with the Canadian Charter of Rights and Freedoms. However, it was not until much later that equal authenticity became a constitutional principle. In the following years, despite considerable improvement in the quality of the French versions of federal documents, the Commissioner of Official Languages (*Commissaire aux langues officielles*) publicly dismissed them for lacking the qualities of the French language and those of the civil law culture (Šarčević in Gémard and Kasirer: 280). In other words, at least in the beginning, the Canadian government's approach to bilingual legislation simply was not able to ensure that all legal documents were equally and sufficiently "bicultural" or "bijural".<sup>235</sup>

To this day, in Canada, Francophones and Anglophones do not engage in face-to-face meetings based on equality, trust and mutual understanding as often as they are expected to (Cameron and Simeon 14)—for three chief reasons: the size of the country, inadequate level of bilingualism and the oblique and incomplete nature of the interactions that most people engage in (Ibid. 15). In Canada, as in any country, because of some extravagant costs maybe, there is often a powerful tendency towards linguistic homogeneity—and even linguistic hegemony—unless there are strong countervailing factors (Ibid. 16).<sup>236</sup> What this

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<sup>235</sup> This is truly appalling. Even in Louisiana more than 100 years ago, when there were to be two different versions of the same code (a French original and a corresponding English translation), the legislature directed that in case of ambiguity, both the English and the French texts shall be consulted, and shall mutually serve to the interpretation of one and the other. Eventually, however, in an effort to avoid controversy maybe, the Louisiana Supreme Court held that both texts were to be considered authoritative and that compliance with either would be sufficient. *Vide* Ward, 2003, p. 9.

"any obscurity or ambiguity, fault or omission, both the English and the French texts shall be consulted, and shall mutually serve to the interpretation of one and the other." As the anticipated disparities between the two different texts began to manifest themselves, the Louisiana Supreme Court attempted to comply with this legislative mandate by comparing and contrasting the two texts. Eventually, however, the state supreme court held that both texts were to be deemed authoritative and compliance with either was sufficient.

<sup>236</sup> Interestingly, the term "cultural hegemony", which is popularized if not coined by the Italian Marxist Antonio Gramsci, may resonate with some sociolinguists with nationalistic sentiment. Similar to "linguistic hegemony", cultural hegemony refers to one of the ways in which a ruling class dominates the subordinate classes, a mode of domination which would not be effective if the subordinate class did not believe in the ruling ideas. *Vide* Burke and Porter, 1987, p. 15.

does say about the practice of bilingualism—as least in the Canadian context—is that translation entails considerable delays and costs, as well as the near impossibility of translating all communications, none of which can be resolved by a simple piece of federal legislation. Eventually, this, if not handled properly, will result in a wider gulf between the two linguistic communities (Ibid. 158). Moreover, on the legal front, Canada is unique too. While Canada's *de facto* constitution, the *Canadian Charter of Rights and Freedoms*, was modeled on British law, Canada has its very own law-making authority and structure that is independent of Britain's. At the same time, it is also completely different from its American counterpart. True, Canada's laws and institutional arrangements mostly originated in a history of European domination and are hardly "homegrown products" (Fitzgerald and Wright 2000: 17). As a result, British common law and French civil law form the backbone of modern Canadian law, with the native laws and traditional practices of the First Nations peoples of Canada largely ignored until fairly recently, much to the dismay of anthropologists. Even in regard to the judiciary, Canada has a complex court system and many intertwining factors (such as the dual systems of federal and provincial that is similar but not totally the same as that of the USA, as well as the fact that the federal government gets to appoint judges to the superior courts of provinces and, of course, the Supreme Court of Canada) further contribute to this uniqueness and complexity (Ibid. 95-96). It was partly because of these unique features (along with things such as its democracy) that Canada developed its own co-drafting process.

Presently, the Canadian bilingual co-drafting team consists of these personnel: two professional drafters (one Anglophone with common law training and one Francophone with civil law training), one or more revisers, and one jurilinguist (Šarčević 281). After the information briefings with the subject specialists from the ministry in charge of the bill, the co-drafters discuss the project at length and try to agree on a strategy for the production of both texts based on the ministerial directive prepared by the minister in charge. Working in the same office, they proceed *pari passu*; they go section by section, comparing and revising both versions closely as they proceed (Ibid. 281). Understandably, though time-consuming, this method ensures unity of thought and keeps discrepancies to a minimum. Then the actual drafting is followed by a systematic revision of both texts by revisers and editors to guarantee coordination and the highest linguistic quality possible. The texts are

then scrutinized by jurilinguists, whose task is to make sure that the two texts are equivalent not only in meaning but also in terms of culture (281-282). Frontline co-drafters have acknowledged that the quality of a piece of legislation under co-drafting depends on what jurilinguists do (Ibid. 282).

Admittedly, this model guarantees “equal effect” across the two versions—which are both considered authentic—without making the French version a mere mirror image of the English one (or *vice versa*); what is more, the two versions need not even look alike, sound alike or of comparable length (Ibid.). Not having to adhere to strict parallelism or formal equivalence, Francophone co-drafters began incorporating civil law drafting characteristics into their drafts, resulting in greater stylistic diversity. As the case regarding the *Marine Transportation Security Act*<sup>237</sup> has clearly shown, the two versions do not even have to appear “parallel” in terms of coordination in layout, much less in terms of length or other typographical parameters. As a result, general drafting practices in civil law such as the relative small amount of words in a sentence in a code or a piece of legislation might be one of the advantage to co-drafting, as not only does civil law rely heavily on statutes, but its statutes, in turn, are also inclined to rely on context and inference and are less explicit as a result (Ibid. 283). In any case, the bottom line is, in the legal translation context of Canada, a law that applies to average citizens needs to qualify as an original in both official languages—in both the legal and linguistic sense (Ibid. 290). Now, having covered how co-drafting is carried out in Canada, let’s have a look at the co-drafting situation in Switzerland, a country recognized as one of the most industrialized, democratic, multilingual and multicultural in the world.

It is no secret that Switzerland is a country like no other. It is a wealthy and diverse country; in fact, it is arguably one of the most multilingual countries in the world, with three official languages (French, German and Italian) at the federal level and four (those three plus Romansch, which has official status in only one canton—Graubünden) at the national level. On top of that, each of the 26 cantons may have its own official language(s) set forth in its own constitution. It is no wonder that Switzerland, along with Belgium and Finland, all three being plurilingual countries, is admired for boasting the “most complete

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<sup>237</sup> *Marine Transportation Security Act* (S.C. 1994, c. 40)

form of legal multilingualism” (and probably also the most perfect form of federalism) in Europe, if not around the world, by some (Ng in Glanert 61).

Surprisingly, however, the path to equal rights for all language groups was not very smooth, as most bills had still been drafted in German until recently, and in German only, as the Federal Council confessed. This remained largely unchanged well into the late 1980s, when roughly only 10% of federal legislation was originally drafted in French (Šarčević in Gémard and Kasirer 285).<sup>238</sup> Subsequently, for some landmark statutes, as a compromise measure, the Expert Drafting Committee was called upon to draft at least some parts of them in French and then have them translated into German and vice versa (Ibid. 286). This is called “bilingual drafting” (*rédaction bilingue*). As a result, this led to both versions of a particular draft consisting of some original parts and some translated parts at the same time, which is something that I personally consider rather grotesque<sup>239</sup>. Again, with co-drafting conducted in Italian an irreversible trend, a three-language co-drafting process would be possible, but would undoubtedly slow down the process, which will have a ripple effect on legislation quality in general.

In Switzerland, bills are not drafted by professional drafters but by subject experts from the department that is sponsoring the bill (Ibid. 286). Before anything, the draft bill is usually translated into French by the Translation Section of the department concerned, and both versions are then submitted to the In-House Administrative Drafting Committee for systematic revision. Before, the committee was only responsible for the German version, but a French language team was subsequently added to the committee. Sometime in the 1990s, the practice of co-drafting (*Koredaktion*; *corédation*) was introduced—with a twist—to coordinate the interaction between the German-language team and the French-language team. Basically what it does is more like redrafting and rewriting than co-drafting in the Canadian sense, and this is exactly what sets it apart from the Canadian co-drafting model (Ibid. 287). Typically a co-drafting team consists of four members (one jurilinguist and one lawyer for each language) who work side by side to rewrite and coordinate drafts

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<sup>238</sup> Ironical as it may seem, despite Italian’s status as an official language at the federal level, it was not until the late 1990s that an exclusive and reliable Italian co-drafting team was available.

<sup>239</sup> Please take note, though, that legal language scholar Šarčević, in her passage, considers this “encouraging” (Šarčević, p.286). Academics can have diverse views.

in both languages of all statutes, making sure that they enjoy the same language quality in terms of clarity and style (Ibid.). Essentially, Swiss-style co-drafting is redrafting and rewriting (Ibid.).

Needless to say, the Swiss model has undergone its share of criticism for failing to include a draft of a statute in both languages from the very beginning. For the sake of language equality, ideally, a text should be drafted in both German and French as early on in the process as possible, but if this is out of the question, then the next best option (recall opportunity cost!) would probably be to have the draft drawn up in one language, then rewritten and translated with both drafts finally revised by means of co-drafting (Ibid.). In terms of transparency, the Swiss co-drafting model has worked very well. The resulting legal texts are, by and large, natural, and since in Switzerland there is only one legal tradition, stylistic diversity is encouraged for the sake of clarity (Ibid. 288). Apparently, the Swiss co-drafting model serves the ultimate goal of legislative multilingualism in seeking to produce texts that are legible and comprehensible not just to jurists but also to the general public who are obliged to follow all laws passed and enacted, and it must be praised for its clarity, transparency, concision and coherence (Ibid. 287-288). In regard to stylistic diversity, it appears that it should give way to the natural look of legal texts and is only encouraged for the sake of clarity and not as a purpose in itself.

Apparently, slavish and word-for-word legal translation, which was once admired, has had to give way to something like co-drafting, and co-drafting is just like an entry ticket to the ultimate objective of language equality. While the practice of co-drafting seems promising at the moment, as demonstrated by Canada, the EU and Switzerland—each in its very specific and unique way, we should proceed with caution for the time being, as some legal translation academics have warned. Additionally, while the practice of co-drafting highlights the universal value of equality for all official languages by including jurilinguists and legal translators in the drafting process at an early stage, as co-drafting is just getting off the ground in the face of the long history of legal translation, it remains to be seen whether co-drafting will eventually stand the test of time for every jurisdiction, every legal tradition and perhaps every language pair (Gémar in Glanert 80). Moreover, in Canada and Switzerland, people throughout the legal profession have come to realize that legislative

bilingualism and multilingualism (or, collectively, plurilingualism) must not stop simply because all legislative documents are presented in every official language, but should further strive for broader cultural understanding and closer interaction among all language communities, which will, in turn, make both bijuralism and bilingualism easier to achieve. Perhaps this is what “economic equilibrium” is supposed to mean.

Another aspect about Switzerland’s multilingual legal drafting is the limited variation in style and the parallel arrangement across all three versions without compromising substance too much (Ibid. 289). Finally, in terms of authenticity and validity, as in Canada, all language versions of the same document are equally authentic in Switzerland—at least in principle. However, the Central Language Service of the federal government has its own approach to generating multilingual versions of any legislative text. Save in the canton of Berne, where both French and German are granted official status by the constitution<sup>240</sup>, parallel drafting (or *rédaction parallèle*), the Swiss term for the Canadian-style co-drafting, is still being stored high up the shelf as an ideal at the moment (Šarčević in Gémard and Kasirer 290).<sup>241</sup> What this means for translation studies from an economic perspective is the potential risk and the costs and benefits involved, which all have a bearing on the issue of resource allocation. While I personally do not see anything inappropriate with translating statutes and legal documents, as long as it is done carefully and properly, if most people in Canada and Switzerland (or even the EU) disapprove of legal translation, whereby one version is always the original while all subsequent others become target texts, then that position should be respected. The question, then, is how to carry it out properly short of downright “translating” the source text. True, there have been at least two law drafting models devised by ingenious jurilinguists presented herein: co-drafting and bilingual drafting, one of which is preferred by Canadian drafters and the other by Swiss drafters, but this does not mean that they do not need to undergo some economic scrutiny. Several economic trajectories, such as risk and cost, are of some value in this case and deserve some attention while the two drafting models are being considered and compared.

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<sup>240</sup> Art. 17 paragraph. 1 of the constitution prescribes “La langue allemande et la langue française sont les langues nationales.”

<sup>241</sup> Inevitably, co-drafting, which worked well for Canada, a bilingual country, will be met with some challenges in a multilingual country like Switzerland, and their apprehension is only understandable.

In sum, at a minimum, whatever name we want to give it, and whatever the purpose of it may be, co-drafting is a process that embodies legislative bilingualism with a view to producing legal texts that are not only of equal status but also clear and understandable not only to legal professionals but also to a broader audience, whose lives and well-being depend on these laws. All these drafting models being reviewed here—along with all the values they involves—can and must be placed under the scrutiny of economics.

### 3. Jurilinguistics: How It Feeds into Economics

It was probably by chance that a field of research named jurilinguistics came into being. While there is no denying that language shapes the law (and it is in this sense that language has a bearing on law), professionals from both disciplines have long been either ignorant or sceptical of each other's work. Lawmakers, who are elected politically and supposed to answer to their electorates, know little about the translation of the laws that get passed by them, and sometimes even legal professionals are not sure of the role of interpreters in the courtroom. At the same time, unlike literal literary translation, literal legal translation might not be appreciated as much. Indeed, a literal translation of a legal text would, *prima facie*, seem more preposterous than one of a literary text. After all, who would want a legal document that may inflict a legal effect on them without their consent to read like an exotic and difficult to understand piece of writing and nothing else? By the way, the interpretation of legal texts does not just involve language but also the values and traditions represented by the text in question, complicating matters for the legal translator. Hence the need for jurilinguistics.

Despite this apparent lack of mutual understanding between the two fields/professions, there are a number of examples that show a recent reconciliation between these fields, with initiatives that range from creative movements to simplify legal language to the establishment of jurilinguistics. Law, or legal science, is becoming a core part of many translation and interpreting program curricula, and jurists are becoming more and more aware of the linguistic nature of their profession. Jurilinguistics reminds us that law may be thought of not only as a tool for the social order and the legal order, but also as a bundle of evolving communicative acts intimately linked to the pursuit of justice, which, if ignored,



may lead to miscarriage of justice. This form of existence highlights the need for new synergies: the implementation of bilingual programmes in law or the specialized training in law for translators and interpreters are just basic examples of the new disciplines that are emerging through the internationalisation of legal relationships and the creation of supranational structures (typically the EU and, to a lesser extent, ASEAN). In light of these circumstances, specific and focused training and diverse (or *diversified*) professional profiles become more and more of a necessity. This would entail producing an independent academic narrative, based on a research corpus deduced from the methods existing in both disciplines and all peripheral ones that touch on the two, such as comparative law, applied linguistics, corpus linguistics, legal language, legal translation, multiculturalism...etc.

Yet it was probably no coincidence that jurilinguistics originated in Canada, an officially bilingual and bijural country with two languages and two legal traditions leaving a heavy footprint on the legal translation “landscape”. It is one of the few countries in the world where both civil law and common law have a proportionally comparable foothold in the legal order. As previously stated, Quebec, under the *Quebec Act* of 1774, got to retain a substantial part of the body of law introduced to them by the settlers from France—civil law, which has coexisted with common law on Canadian soil ever since. Jurilinguistics, the linguistic study of legal language, deserves at least a quick look. This brand-new discipline, developed by Canadian jurists from several universities and institutions all over the country, involves, among others, law, linguistics and translation<sup>242</sup>. It appears to have been such a proud invention for the Canadians that *Juridictionnaire*, the electronic legal term database that operates as a division of Termium Plus, regards itself as a *jurilinguistic* (instead of legal, juridical or lexicographical) database aimed at serving a bijural and bilingual country like Canada. Across the realm of law, there is a slow but clear trend in which form is taking over substance in a way, and this has been demonstrated by the presence of jurilinguistics (Glanert 73). But what exactly is this magnificent subject of jurilinguistics anyway? At this point, alas, there seems to be a lack of strong consensus on

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<sup>242</sup> Le terme «jurilinguistique» a été forgé au Canada à la fin des années 1970. Il dérive du terme «jurilinguiste», dont la création est attribuée à Alexandre Covacs, alors directeur des Services linguistiques français à la Section de la législation du ministère de la Justice du Canada. For details, please refer to Termium Plus at <http://www.btb.termiumplus.gc.ca/tpv2alpha/alphaeng.html?lang=eng&i=1&index=ent&srchtxt=JURILINGUISTICS>

this. Simply put, jurilinguists<sup>243</sup> are specialists in the language of the law who do not necessarily have a law degree, and their task is to make sure that the two texts are equivalent not only in meaning but also equivalent culturally speaking (Gémar and Kasirer: 281-282). Jurilinguistics seem to touch on every aspect of legal bilingualism and legal dualism—both stark characteristics of Canada. Since the days of the Cold War, legal bilingualism and bijuralism have been two categories that are so entrenched in the Canadian culture that can, the way Kasirer sees it, potentially afford a “middle power status” to Canada as a role model in this area (Kasirer in Gémar and Kasirer 579). Or, put another way, between the two fields of endeavour of law and language, Canada is taking a moral posture of staying in the middle by “establishing” or “generating” a field of research called jurilinguistics, thereby placing themselves *entre langues et droits* (Ibid.). I believe that this metaphor, which must have originated in Cold War international politics that was exceptionally confrontational, is certainly descriptive and, for the most part, adequate.

To boot, while this metaphor may have some truth to it, it would be an exaggeration to claim that legal professionals in Canada were the first ones ever to engage in the interaction between law and language, for Peter Tiersma, for one, has a whole chapter entitled *Linguistics in the Law* in his book *Speaking of Crime*, proving that the academic enterprise is not entirely a Canadian thing. In recent years, there have been efforts to establish a stronger link between comparative law and language, proposing a potential perspective of language as a cognitive model for comparative law (Curran in Reimann and Zimmermann 2006: 699). At the same time, all translation can be viewed as an act of communication<sup>244</sup>, and, by inference, so is legal translation. While legal translation can be treated as a form of communication, it is no secret that since it involves a transfer between two different legal systems, and sometimes even two legal traditions, each with its own system of referencing and conceptualizing, it can be quite a challenge even for the most seasoned legal translator. This is by far the greatest challenge to presenting the “objectivity” of the law in the form of an “objective” translation (Boyne in Glanert 124).

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<sup>243</sup> Though not widely used worldwide yet, this term may have different shades of meanings in different countries. *Vide* Gémar and Kasirer, p. 281.

<sup>244</sup> The metaphor of translation as communication has earned considerable currency in translation studies. In the work entitled *The Translator as Communicator* by Basil Hatim and Ian Mason, where translation is likened to communication for its inherent nature of verbal interaction. *Vide* Hatim and Mason, 1997, vi.

This, I think, may shed some new light on jurilinguistics, as well as on legal translation. In my opinion, at the very core, jurilinguistics is (or *can be*) a platform where economics and legal language crisscross each other on a larger and broader scale. At a minimum, the routine topics and questions that come under the microscopic scrutiny of jurilinguistics, which include tenets like legal terminology, language of the law, legal lexicography and, of course, legal translation, along with ones that come underneath these ones in the hierarchy such as language and identity, language and gender, law and gender, law and race...all have a very economic aspect to them (though in varying degrees). For a quick reference, does language and identity not have an economic aspect to it in that a language gets used (or goes into disuse) because the use or disuse thereof would bring economic benefits to the speaker who may or may not appreciate the identity that automatically comes with that language? Obviously, speaking a language can cause great risk at times, and the speaker, who is a rational and self-interested human being, has to decide what language to speak. The same applies to the legal professionals especially, although Kasirer seems to suggest that there has been an uncalled-for lack of dialogue between civil law jurists and common law lawyers in Canada that might be the result of some ignorance and pride (Ibid. 583). In addition, jurilinguistics can have a great deal to contribute to the plain language movement (or the Plain English Movement, or PEM, as some prefer to call it, such as Peter Tiersma<sup>245</sup>) in that jurilinguists are non-jurist experts in the language of law who are day-to-day consumers themselves. Advocates of the PEM believe that average citizens have an unalienable right to understand legal documents they are “forced” to sign—especially those that concern their rights and duties in the course of daily life. This, of course, poses a challenge for consumer rights activists who are constantly in pursuit of a balance between the consumer and big businesses, but it can be mitigated with help from jurilinguists.

Kasirer, while supportive of jurilinguistics, a discipline that is supposed to be interdisciplinary and diverse, does acknowledge the rather immature status of it at this point, labelling it with the oxymoron “undisciplined discipline” (Kasirer 582). Indeed, even if the jurilinguist is to be situated in the “middle”, he does so in a “psychological” way and not in a physical way. As such, it is my firm position that jurilinguistics will be doing itself

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<sup>245</sup> This movement started out as a social movement for consumer protection in the USA in the 1970s. *Vide* Peter Tiersma, 1999, pp. 220 *et seq.*

a great service by enlisting economic methodology, not to mention that getting a new discipline like jurilinguistics involved in economics would be a better option than silently acquiescing to its status as a middle power or an “in-between” trying to strike a fine between two powerful forces (law and language). True, since the height of the Cold War, Canada, overshadowed and marginalized, has historically had to find a way to survive brutal international politics, but this does not mean that Canada should keep identifying itself as a “middle power” forever—at least not in academia; it can certainly become the spotlight (and not just *in* the spotlight) of many academic disciplines such as legal translation, law and language, comparative law and jurilinguistics, thanks to the two valuable assets of bijuralism and bilingualism she has had under her belt since the founding of the nation. Moreover, while the word “middle” might suggest impartiality and some degree of romance, jurilinguistics does not have to qualify as a “middle space” in order for Canada to gain a foothold in. In my opinion, as long as jurilinguistics can yield economic advantages and benefits, and as long as economics can be employed to explain and justify the many topics that are of interest to jurilinguists, then the “two bilingual voices that become four bijural ones” that are in a dialogic yet incoherent relationship, as described by Kasirer, will be better described, explained and justified by means of economics—a behavioral science.

Whether the two legal traditions of common law and civil law will ever be “harmonized” or come to a “compromise”, as suggested by Kasirer, is still anyone’s guess, but whatever the likelihood, one thing is for sure: involving economics during the process and after the fact will be beneficial to the transition. Who can deny that the jurilinguist, whose bread and butter depends on things like legal terminology and comparative law, is more or less a middleman or a “broker” working between legal traditions (and even if the legal translation involved is from the same legal tradition, say from French into German, he is working between two legal orders and two legal cultures that come with their inherent baggage) and also between two languages at the same time? And should the legal translator be given the latitude to “create” law while embarking on a gravy train where she travels, loiters and roams between/among legal texts? And if so, will that jeopardize her prestige as an “honest broker”? Truth be told, legal translation is no more innocent than legal language, and there is no disputing that legal language comes with ideology. All symbolic practices carry some

ideology, and ideology is constituted through language (Philips 8), and by inference, legal translation will come with its ideology too, some of which as a legacy (or a complication, depending on one's position) from the legal language enshrined in the legal text/document being translated. Apparently, all these questions seem just as a mystery as they did three decades ago, when DTS started to gain momentum, but, luckily, there is now a better answer to these questions asked by/of jurilinguists, and that is economic methodology.

As Nobel laureate Gary Becker so justifiably asserted, an important step in extending the traditional theory of individual rational choice to the analysis of all sorts of issues (in my case, legal translation and jurilinguistics) beyond issues (such as the correlation between interest rate and unemployment rate, as well as a healthy overnight rate) that economists traditionally bothered to contemplate is tantamount to formulating a theory out of a much richer class of attitudes, preferences and calculations (Becker 1993: 385). Now, in order to put his thoughts into action, I am seeking to show how economics might contribute to the development and perfection of jurilinguistics.

Whether legal bilingualism is an advantage or a disadvantage is not a question to be taken lightly; instead, it is a question to be answered scientifically, supported by a raft of statistics and figures that were obtained through positive and rigorous means. Granted, there is still considerable controversy about whether legal bilingualism is a good idea; true, there is still debate on legalese and legal translation—a transformation of legal language in a way; and yes, there is no consensus (yet) on how legal translation can be best carried out between two languages, much less between two legal traditions, but these question, which, apparently, involve behaviour and action on the part of some participants (who are all human beings) can be approached from an economic angle. As a hypothetical proxy, if we are to argue for (or against) co-drafting (Swiss-style or Canadian-style) for the sake of language equality on the assumption that is worth it despite the time and heavy financial costs it may incur, then we are, in effect, making an economic claim even without noticing it. More specifically, we are weighing one set of values (such as, in our case, language equality and the value of non-translation) against another (such as financial cost, time cost and extra co-drafting personnel cost). Drafting the law in one language and translating it into the other official language before getting both versions passed by Parliament seems

like an inexpensive option, but why do more and more multilingual countries/jurisdictions today tend to go with some complex models of drafting laws, such as co-drafting or bilingual drafting? Well, the intuitive answer, simply put, is that in law—and also in both domestic politics and international politics—there simply too many intertwining and conflicting interests and values to account for, of which financial cost and pecuniary interest are but two of them. The same thing can be said of whether legal translation across legal traditions is possible, another one of the frequently discussed questions in jurilinguistics. From an economic point of view, as long as the original legal text (say, in English) presented in the target language (say, French) is acceptable to the client (i.e., whoever is hiring the translator) or the target reader, then it would mean that the translation services were worthy of what they cost them. In plain words, if the legal translator is confident that her client or her target readership is ready to accept “intent” (for which I personally prefer “*mens rea*”, since the English term “intent”, as in “assault with intent to rape”, is actually closer to *Absicht*) for the criminal law term *Vorsatz*, and “eventual intent” for *Eventualvorsatz* or *dolus eventualis*, then so be it even if such German-to-English legal translations would probably not sit well the jurilinguist, who might prefer the term “contingency intent”, a term that sounds more professional and law-like. A similar case can be made for the term *Untauglicher Versuch* (literally, “frustrated attempt”), which is a form of *Versuch* in civil law and which is similar to (but still different than) “legal impossibility” of common law.

Perhaps it is high time that the debate over whether the legal translator should be allowed to create new meaning and inadvertently “make” law stopped. True, legal translation theorists like Judith Lavoie claims that, while she is not sure (yet) if the legal translator should be afforded the status of a “meaning creator” or even an interpreter, she believes that the legal translator deserves more power in his line of work than he currently wields otherwise all his legal translation renderings will amount to little more than “simple translations” (*traduction simple*) (Lavoie 2002: 206). This is a statement that everyone that is devoted to the translation of law should keep in mind. What powers and to what extent with each power the legal translator should be given makes for an excellent economic question. I believe that only in this way can the legal translator relieve herself from the age-old spell of a “two-sided sickness” and a double invisibility—first as a jurist and then as a translator—as

lamented by Kasirer (Kasirer 591). Also only in this way can the awkward situation of an “all-powerful legislator coupled with an impotent legal translator” be rectified (Ibid).

#### 4. Some Examples

First and foremost, let’s have a look at the legal groundwork of the EU itself. The fundamental philosophy of this supranational body was the promotion of the universal values of peace, unity and security for every citizen of Europe through the social and economic benefits of market unification, which, in turn, is to be achieved through the “four fundamental freedoms” of the EU: free movement of goods, workers, services and capital (Glendon *et al.* 300).

The EU being a supranational body with unique status as it is, there are primarily three sources of law in the EU: primary legislation, secondary legislation and everything beyond them. The first and foremost is primary legislation, which is created by the member states, and this includes all founding treaties of the EU along with their protocols, amendments and annexes. Secondary legislation, which is a category subordinate to primary legislation but much more common as a source of community norms, includes all laws passed by EU institutions acting within the scope of the treaties mentioned above. Finally, there are sources of law beyond primary legislation and secondary legislation that include other treaties and international agreements, ECJ decision and general principles of law scattered all over law literature (Glendon *et al.* 304).

Granted, one of the key characteristics of the European Union is its multilingualism. The very first piece of legislation, Council Regulation No 1/58, which was promulgated in 1958 and regulated the use of languages in the former European Economic Community (EEC) and thus functioning as the Community’s language charter, stipulated that all four official languages of the member states be equal (Dutch, French, German and Italian.). Following in the legacy of this policy, today, for the sake of equality for all EU citizens before the law and to guarantee every citizen equal access to all legal documents detailing their rights and obligations in a language that is intelligible to them, every piece of EU legislation has to be published in all 23 official languages of the EU, which is, essentially, the realization of

what is referred to as the “free movement of judgments” by Sir Bingham (Bingham 115). In the eyes of Glanert, this trend feeds into what she calls “transnationalism” (Fr.

*transnationalisme*), an ideology under which nation states become more mutually dependent, international organizations play a bigger and bigger role and common markets increase in number (Glanert 2011: 6). This, I believe, further feeds into the framework of the four fundamental freedoms (of capital, labour, services and goods) with the addition of a fifth one, and together all five of them lay down the very foundation of the EU.

The line between original and translation is blurring, and every language version of the same document must be treated as parallel and equal, for the sake of language equality. This is one key reason why some are claiming today that no one version deserves to be called the “source text” or the “original”, and why, at the same time, no one version should be regarded as nothing but a “translation” or a “target text” either, as this would suggest something inferior and subsequent. A document—any document, once officially translated, must and will be granted full and equal authenticity, at least in the public domain. This rule is adhered to so firmly that in recent years, calling a version—any version—a translation is becoming more and more of a taboo, with the appropriate name being “language version” (Gibová 2009: 147-148).<sup>246</sup> However, at the same time, ironically, Gibová laments the trend of what is supposed to be a translation becoming nothing but an “interlingual text production” of the source text (Ibid. 148).

Another trend concerns the reliability of EU translation being judged primarily on the basis of linguistic purity and certainty in the law, or “legal certainty” (*Rechtsbeständigkeit*). Certainty in the law is, of course, an objective of most legal orders, but in the civil law tradition, it has become, in Merryman’s words, a “supreme value and an unquestioned dogma” (Merryman 1985: 48). What this entails is that judges would be prohibited from making any law, and all legislation, for the sake of certainty, should be as clear, complete, spontaneous, self-standing and coherent with the interpretation and application of that law as possible. In this sense, the emphasis on certainty in the law (legal certainty) marks the path towards a “judge-proof” legal regime (Ibid.). Because of this, a long spectrum

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<sup>246</sup> For example, “German language version” would be preferable to “German translation”. Also, personally, I would, drawing on an analogy from gender and racial issues, prefer to call it “politically incorrect”.



consisting of tenets derived from the basic principles of EU law and translation practice within the institutional setting will become indispensable (Gibová 151).

For starters, there are a number of legal terms for which an “equivalent” in another language is obvious—even intuitive, such as *contrat* (French) for “contract” (English) and *hypothèque* (French) or *ipoteca* (Italian) for “mortgage” (English). Anyone with at least some background in semantics or translation studies can tell that these are all examples of “false friends”<sup>247</sup>, and a false friend is often a source of confusion—for translators and language learners alike. As Merryman once put it, while these seemingly equivalent terms may have a common core, they also have different fringes at the same time (Merryman *et al.* 43). Indeed, in reality, these apparently “equivalent pairs” are not as “equivalent” as they are anticipated to be. In common law, under the doctrine of consideration, which Justice Holmes refers to as “merely historical” (Holmes 2009: 21), consideration (or *quid pro quo*) is an element *sine qua non* to the concluding of a contract, and it is consideration that sets a contract apart from a gift. On the other hand, however, in civil law, there is no such contractual element; almost any promise can be invoked to form the basis of a contract and can thereby become enforceable by law—even a gratuitous promise<sup>248</sup>. Then comes the fundamental question. If “contract” is not supposed to be translated as *contrat* (and vice versa), then how is it supposed to be translated (if at all)? The short answer, according to Glanert, seems to be by adding an extra element to the supposedly French “equivalent” *en contrepartie de la somme de*, however clumsy it may seem (Glanert 77). Needless to say, a compromise like this is far from perfect and might not make a defensible position. In fact, a good many legal translation scholars dismiss this option for its ensuing lengthiness and cumbersomeness even if it is done in the form of a footnote or an in-text illustration in parentheses (Curran in Reimann and Zimmermann 678).

Using French-English legal translation as a template, and focusing on this particular language pair, Gémard concluded that the entire legal vocabulary can be broken down into three main categories for translation purposes: (a) terms for which equivalence in the other

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<sup>247</sup> A typical example of a false friend is the Spanish word *dirección* (which actually means “address”) as it appears to the native English speaker, and the Russian word *фамилия* (translit. *familiya*, which actually means “family name”) to the native English speaker or native French speaker.

<sup>248</sup> This is debatable, but for the moment, for the sake of brevity, I will leave this claim as it is, as delving into further details would be unnecessary, and even superfluous, for this research.

language is obvious, established or at least widely accepted (e.g., contract and *contrat*); (b) terms whose equivalence is only partial and not total (e.g., tort and *délit*); (c) terms that cannot be rendered in the other language for various reasons (such as *Zumutbarkeit* and *Vorsatz* for German and *fee* and *fee tail* for English (Glanert 76). Arguably, in his eyes, translated legal terms seem to come together and form an “equivalence continuum” ranging from functional equivalence to loanword formation and calquing (which is, in a way, literal translation). All modes (or devices) of translation will fit into a niche somewhere along this continuum.

The European Union, with its 28 member states featuring 24 official languages and at least two of the major legal traditions, is rich in legal translation examples. Many EU institutions, notably the European Commission, the Council of the European Union and the European Parliament, are always eager to enact new laws, all of which must eventually be translated. After all, all legal documents must be made available and accessible to all 500 million citizens in all official languages for all EU citizens to be expected to know the law and follow it. True, as we have seen previously, co-drafting is a potential alternative to legal translation, but it will be almost impossible for all 23 official languages. Currently, it is only possible in multilingual jurisdictions that are relatively small in size like Canada and Switzerland, but, nonetheless, given their valuable experiences, both these countries have made excellent examples of themselves, and this will definitely shed some light on the feasibility of co-drafting on a worldwide scale.

There is one last question that must be addressed before my conclusion, and that is that there seems to be an assumption being made about the potential or inherent link between a language and a legal tradition. Is there, however subtly, a so-called “common law language” alongside a “civil law language” (and also, by inference, an “Islamic law language”)? Comparative law professor William Tetley, who has published prolifically on the civil law tradition in Louisiana, seems to think so, though he made his point very subtly in this passage:

There is no need for legislators, judges, lawyers, law professors or students to possess even a reading knowledge of French in order to complete their training and to practice their professions. Even some of the great French civil law treatises have been translated into

English and are consulted only in translation by most Louisiana jurists, because they cannot read the original versions. Legal publishing in the state is in English only. These factors contribute to the weakness of the civil law tradition in Louisiana, which, coupled with the strength of federal law, has resulted, for example, in the replacement of the provisions on securities in the new Louisiana Civil Code by the Uniform Commercial Code chapter. (Tetley 2000: 730)

As an antithesis, former Supreme Court of Canada justice Michel Bastarache thinks otherwise. It is his firm belief that any human language (French or English) can be employed to describe any law (common law or civil law), and any legal institution can also be equally and adequately described with any human language, be it English or Arabic.<sup>249</sup> Nicholas Kasirer seconded this view in one of his papers by asserting that the sounds of a legal tradition “cannot be monopolized by any one language” (Kasirer in G  mar and Kasirer 580). This probably explains why common law is able to be taught in Quebec in the French language on many campuses in Canada. Arguably, whether a human language (English or Russian) can potentially be classified as a “civil law language” or a “common law language” is still a proposition open to spirited but heated debate. Assuming that this claim were true for the sake of argument for the moment, if the essential divide between two languages does not preclude translation, why should the quintessential divide between two legal traditions preclude legal translation altogether? Thus, legal translation—along with legal language—is well and alive despite its somewhat complex and elusive nature, and the only question remaining is this: How are we to explain it when it is being conducted across two legal traditions Perhaps we can consider another question, which is different but related, for inspiration. Language—and in particular, vocabulary—, as linguist Anna Wierzbicka claims, serves as the best evidence of the reality of “culture” in the sense of a system of “conceptions” and “attitudes” (Wierzbicka 21). To boot, language illustrates how powerful the grip of our native language can be on our thinking habits (Ibid. 9). This is why a language, or more specifically, its vocabulary, is assumed to highly reflect not just the ways of life that are characteristic of a given society but also the ways of thinking (Ibid.

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<sup>249</sup> Needless to say, some will disagree, arguing that culture and language are closely tied and knit together, and there will never be any escape from it. After all, how does one describe Korean cuisine, which is rich in specialties prepared from all sorts of pork cuts and pork chops, in the Arabic language, which is spoken by a people that are religiously prohibited from consuming pork?

5). True, there has always been intense debate on whether terms of a language “reflect” or “shape” ways of thinking, and to my mind, they do both.

Any comparison requires a *tertium comparationis*, or a “common measure” (Ibid. 22). Even within the same language and within the same legal tradition, legal “translation” is not always as straightforward as expected; in fact, paradoxically, translation occurs even within the same language (Glanert 4).<sup>250</sup> Is there such a thing as a language universal? If there is, then, according to some, only a language universal can be trusted to provide a valid basis for comparing conceptual systems entrenched in different languages and for elucidating meanings that are encoded in some languages and not in others (Wierzbicka 22). In regard to this question, my assumption would be negative.<sup>251</sup> Since Wierzbicka seems to suggest vaguely that a natural semantic metalanguage (NSM) consisting of a common core shared by all languages has not been discovered yet, each language seems to have its own very unique set of rules and vocabulary, making it difficult for the legal translator to comfortably match one lexeme (or any lexical unit) from one language to another lexeme in another language (Ibid. 23-29). Hence, the seeming equivalents of all-too-familiar word pairs like *butter* and *beurre*, and *pain* (French), *pan* (Japanese) and *bread* do not point to the same thing—far from it in fact. This is owing to all the denotations, connotations and implications involved. The same goes for the legal term pair *contract* and *contrat*. Take the legal term *privacy* as a quick example, as demonstrated by G  mar, the rationale being a difference in “mode of intention” as featured in the two languages of English and French. For all we know, languages do not signify in the same way, and legal language is not exempt from such divergences across languages at all. Thus, while the English legal term *privacy* exists in both British law and American law, it does not have the same contents (or *denotata*) in the two contexts, and, as a result, they might invoke very different understandings for legal professionals in the two common law jurisdictions (Glanert in Glanert 4). As manifested through Glanert’s examples, while in the US, the right to privacy has profound statutory basis as stipulated in the Fourth Amendment to the United States

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<sup>250</sup> Surprisingly, this does happen. It is not unusual for a French-speaking TV program or a film from Quebec to have to be subtitled or dubbed before being marketed in continental Europe. Examples like this are many, and one can easily find them by tuning in to the channels TV5 and Radio-Canada.

<sup>251</sup> Of course, a detailed inquiry into language universals, while interesting and relevant, will go way beyond the scope of this research.

Constitution (on which many landmark decisions were made, *Bowers v. Hardwick*<sup>252</sup> being one of them), in England, on the other hand, privacy is understood as the right to be left alone and the right to privacy is hardly protected by law as such. In this case, the “modes of intention” concerned, as Glanert puts it, are rather dissimilar to each other (Ibid. 5).

For the sake of emphasis, once again, legal translation, as a specialized/special genre of translation, is unique for a number of reasons. First off, different legal traditions, as shown implicitly above, just like different cultures, have different underlying cognitive systems, which, in turn, come with different concepts and equally different terms to express those concepts that may or may not be compatible with ones from another legal tradition. A quick analogy can be made from a study conducted a good four decades ago by Berkeley linguist Paul Kay on color terms across languages and cultures.<sup>253</sup> In plain words, it is decidedly difficult to “mix and match” terms and expressions in the legal world. Second of all, oftentimes, the translator becomes the sole communicator between speaker and audience, even the focus of attention in a courtroom setting. This is especially true and inevitable with witness testimony interpretation in a legal proceeding where no one but the courtroom interpreter speaks both languages involved (the language of the venue and the language of the witness), leaving everybody else (this includes the handsomely paid attorneys) at the mercy of whatever (mis)representation the interpreter makes (Gaiba 1998: 33). Not only will this add extra pressure on the translator, but it also somewhat distorts the dynamics of the setting and the discourse that is taking place in the setting. Already, most witnesses report frustration and even humiliation after having testified in the courtroom, and adding a courtroom interpreter (translator) to the scene will definitely change everything, though academics seem divided on whether this would work to the witness’s (or anyone’s) advantage. Last but not least, since every act of translation (this includes legal translation) inevitably involves a process of interpretation (i.e., hermeneutics) on the part of the translator (this, of course, includes the legal translator), and such interpretation will inevitably risk encroaching upon the power of legal interpretation, a power exclusively

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<sup>252</sup> 478 U.S. 186 (1986)

<sup>253</sup> In a study conducted in the 1960s, Kay showed that the colour spectrum being a continuous band lacking any clear-cut physical boundaries, the differences in color terms across languages is striking. However, surprisingly, a set of color universals, which, as he claims, comprises 11 basic color categories, seems to exist. *Vide* David Crystal, 1994, p. 106.

reserved for the judge. The burden is not much lighter on the legal translator (and maybe even the co-drafter) either, who first has to determine whether there exists a comparable concept *quant à la substance* in the target legal system. If there is none, then she will have to determine the “concept nucleus”, or the heart of the concept, along with its periphery (Simonnæs 154). In order to determine if there exists comparability “quant à la substance” in the target legal culture, the two legal cultures (German/Japanese vs. English) with respect to the regulation of the subject matter (in most cases, the legal or juridical relationship), such as same-sex relationship. In the event that no legal term is available in the target language for the legal term from the source culture, it would be on the translator’s shoulders to devise of something to fill in the legal terminology gap. This is in fact a functional approach in comparative law. Moreover, in the event that the source text and the target text do not come from the same legal culture or legal tradition, as is often the case with ultra-new legal concepts like hacking, phishing, surrogate parenting, paternity fraud...etc, then preferably terms that are neutral and non-technical should be chosen. The use of a neutral term is especially recommended when the intention is that the source term and its equivalent appear parallel and easily identifiable. Admittedly, there will always be some culture-bound and culture-specific legal terms here and there (such as *title deed* and *Realvertrag*), and these might require some special handling that is decidedly distinct from the handling of high-technology terms.

I think that there is a court case, *Reference re Manitoba Language Rights*<sup>254</sup>, that deserves our attention, one that concerns aboriginal language rights and coming from the Canadian province of Manitoba. At a minimum, the Canadian Charter of Rights and Freedoms has a whole heading dedicated to language rights, whose title is “Official Languages of Canada”, and it comes with a total of seven sections (Sections 16 through 22), followed by another heading “Minority Language Educational Rights”, under which there is only one section—Section 23. The Manitoba Act of 1870 is an act of the Parliament of Canada that is defined by the Constitution Act, 1982.<sup>255</sup> Section 23 of this law provides that all acts passed by the

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<sup>254</sup> Case citation: [1985] 1 SCR 721

<sup>255</sup> In Canada, unlike in the USA, provinces do not get to promulgate and enact their own constitutions. This marks a decidedly different aspect of the two types of federalism as featured in the two countries.

Manitoba Legislature<sup>256</sup> must be enacted, printed and published in both English and French. Nevertheless, almost all legislations passed and enacted by the Manitoba legislature was done solely in English since 1890, in clear violation of the constitutional provision. While it was simple to declare indiscriminately all monolingual laws passed since then unconstitutional and, thus, invalid, the potential legal vacuum left behind would have been chaotic. What had to be invoked was, according to the Supreme Court of Canada, the rule of law (Bickenbach 33), the rule of law being a principle profoundly entrenched in the constitutional tradition of Canada. The implications of this case include all provincial government bodies and all courts whose very existence relied on some law passed by the Manitoba legislature being declared illegal simply because the law was monolingual since its inception. However, for practical purposes, the Supreme Court of Canada held in its decision that all “invalid” current acts of the Manitoba legislature would be deemed temporarily valid for the minimum period of time necessary for their translation, re-enactment, printing and publication. Allowing the province of Manitoba to turn into a land of chaos and anarchy in the interim would have been a breach to its position as constitutional guarantor of rule of law. Admittedly, this was a necessary and brilliant compromise. Today, because of this law maybe, all copies, paper or electronic, of laws enacted in Manitoba must be bilingual to be considered “official”. Manitoba has a specific law dedicated to the protection of human rights, and that is *The Human Rights Code*.<sup>257</sup> Another landmark case from Canada would be *R v Beaulac*<sup>258</sup>, in which the Supreme Court of Canada endorsed a substantive conception of equality that required the Government of Canada to take “positive measures” to ensure the unhindered implementation of language rights. One of the puisne judges, Justice Michel Bastarache, who is also a well-known jurist, said in his opinion on behalf of the majority that the objective of protecting official language minorities, as laid out in the *Official Languages Act*, being realized by the possibility for all members of the minority to exercise independent, individual rights that are justified by the existence of the community, language rights should not be taken as

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<sup>256</sup> The Manitoba Legislature is comprised of the Monarchy in Manitoba and the Legislative Assembly of Manitoba. The Monarchy, being the foundation of all three branches of the provincial government, is mostly nominal, whereas the Legislative Assembly of Manitoba consists of a total of 57 members, who are elected in single-member constituencies to represent the people of Manitoba.

<sup>257</sup> C.C.S.M. c. H 175.

<sup>258</sup> *R v Beaulac* [1999] 1 S.C.R. 768. File No.: 26416.

negative rights, or passive rights; they can only be enjoyed if the means are provided.<sup>259</sup> Language rights would be, as he concluded, “meaningless in the absence of a duty on the State to take positive steps to implement language guarantees”.<sup>260</sup> This case marked the first time the court had ever been called upon to interpret language rights afforded by Section 530 of the *Criminal Code*, R.S.C., 1985, c C-46, and it made history, while acknowledging that Section 530(1) of the *Criminal Code* creates an absolute right for the accused to equal access to designated courts in the official language that he considers his own, provided that the application is filed timely.<sup>261</sup>

As an aside, some in Canada are starting to realize that neither the federal government nor the provincial government is in the best position to conduct legal translation, especially after the decentralization of power the country has been seeing since the 1960s, and some scholars are suggesting that the authority for legal translation (and maybe even for *all* translation) be devolved upon the private and non-governmental sector (Stevenson and Gilbert in Cameron and Simeon 74). Stevenson and Gilbert proceed in their chapter entitled *Municipal Associations* that municipalities throughout Canada number approximately 3700, and they are forming municipal associations like never before because local governments are taking a greater initiative in the governance of the country (Ibid.). The trend is so remarkable that in recent years, language issues have given rise to separate associations for primarily Francophone municipalities in New Brunswick and Manitoba (Ibid. 75). What this tells us is that while legal translation should be provided for and regulated by law if there is an official bi-/multilingualism policy, but it can be outsourced to private entities—especially in jurisdictions where civil society is strong, and this makes perfect economic sense. This will be a great inspiration for Ireland, notwithstanding this country’s complex post-colonial language history and the ever dominant political rhetoric demanding continued austerity in the provision of public services. Drawing upon the Canadian examples, scholars are starting to believe that the legal approach to the Irish language should be underpinned by a substantive and purposive conception of equality (Ni Drisceoil 48-49). The hard fact, however, is that legal provisions for the protection of the Irish

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<sup>259</sup> *R v Beaulac* [1999] 1 S.C.R. 768, para.20.

<sup>260</sup> *Ibid.*

<sup>261</sup> *Ibid.*, at para. 28.



language, as they currently stand, are failing to meet their own objectives. This definitely needs to change.

Everything presented herein can be seen through the lenses of economics. For our purposes, the courtroom interpreter is a decision maker through and through. Not only that, because of all the attention she receives, she is, in effect, playing a game between herself and a handful of other parties such as the witness that is in need of her interpretation service, the courtroom audience and, most of all, the attorneys of both parties, who, most likely, are not bilingual—with some risks—actual and potential—involved that may or may not be known to her. Everything everyone involved does will have an impact on everyone else.

Oftentimes a good proportion of risk comes from some asymmetry of information (what your opponent knows that you do not), and this asymmetry of information, in turn, as has been shown previously, produces a likelihood of moral hazard and, more indirectly, adverse selection. Furthermore, courtroom interpretation will certainly require extra time and space, which will constitute an externality on the judicial process itself and on all parties involved (and this includes the public sitting in the audience).

In addition, I think that, at least at an instinctive level, well established economic approaches such as choice theory (Is more choice always a good thing? Or perhaps less is more sometimes?) and game theory (viewing legal translation as a game that many parties in a strategic relation are playing) may help us capture the true (bilingual, bicultural and bijural) nature of legal translation despite the otherwise unsurmountable gap between legal traditions.

Another noteworthy legal translation example concerns the modernization of the legal order via reception of western law in Asia. It all started from the Meiji Restoration of 1868, when the newly enthroned emperor of Japan, Emperor Meiji, announced blanket reforms (which included legal reform) that reached into every niche of civilian life. Historical data reveal that legal reform was meant to be an essential element of the Meiji leadership's broader agenda to turn Japan into a modern military and industrial superpower (Merryman *et al.* 510). Both French jurists and German legal experts were commissioned to Japan to assist with the drafting of a civil code, and due to first some mistranslations and then some debate between a traditionalist faction and a internationalist faction, the first draft had to be

scrapped and all codification efforts ended up in vain. Then, in 1896, just shortly after the German Civil Code was enacted, the first three books of the current civil code were enacted, and then in 1899, the Commercial Code was also enacted, followed by the enactment of the Criminal Code of 1907, which was also based on German law (Ibid. 510-511). Meanwhile, on the political front, little by little, Japan was embarking upon a path towards imperialism, first annexing the Ryukyu Kingdom (in present-day Okinawa Prefecture), once a vassal state of China, in 1879 and then occupying Taiwan after the First Sino-Japanese War of 1894, finally also annexing the Korean Peninsula in 1910 after the conclusion of a treaty. While Japan's expansionism wreaked havoc across most of East Asia for nearly a century, Japan, on the law front, did manage to export or "transplant" their own version of "modern" law, or western law, to the countries that they either had a military conflict with or annexed altogether, and these include China, Korea, Taiwan and, to a lesser extent, Thailand. Most comparatists insist to this day that there is much to learn from the experience of Japanese law, which is more about the institutional than the substantive (Ginsburg 2010: 17). For all we know, Japan's earliest codes were drafted by western law experts and/or by Japanese academics who had studied in the West, and many legal terms had to be translated into Japanese via calquing or loaning, and the Japanese achieved this mostly with the use of creative phrases made up of *kanji*, which proved to be a great success. Then, as it turns out, many of China's and then Taiwan's and Korea's codes were, in turn, modelled on their Japanese counterparts, and this turned out to be yet another remarkable success. Today, the legal vocabularies of the languages of Japanese, Chinese and Korean share a high degree of overlap and similarity aside from some minor adjustments that were necessary for the accommodation of language-specific orthography and/or regionalism.<sup>262</sup>

True, during the days of colonialism and imperialism, the laws of the imperialist were the sole legal authority for the colonies. In our modern times, legal transplants imposed unilaterally by an imperialist or a conqueror are quite rare, but legal transplants still exist—this time in a milder and more "humane" way. Legislation in many areas, especially areas that touch on biotechnology, bioinformatics and internet technology, require calquing or

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<sup>262</sup> In this respect, a strong case of cost-and-benefit analysis can be made out of the legal reception of Japanese law and, indirectly, of German law, by Korea and China in the form of legal transplantation. Granted, it was a great success, but the path to the modernization of the law and the judiciary was nonetheless a long and trying one that came with humps and bumps along the way for both Korea and China.

direct loaning from English, the lingua franca of the Internet. In these cases, legal translations are imposed on weaker cultures by means of soft power. This, in my view, is just another form of legal transplantation—one that thrives on cyber technology.

Before I end, as a citation of cultural studies scholar Anna Wierzbicka's proposition and as an extension thereof, I believe that we will probably understand legal cultures better if we try to learn and study legal languages more deeply and in a broader perspective, and vice versa. It is, therefore, important for comparatists and the legal translator to understand both sets of legal vocabulary thoroughly before making an attempt at meaningful legal translation.

## Chapter Five: Conclusion and Recommendations for Future Research

Today, translation studies, as an object of study, is (once again) at a crossroads. Globalization and fast-paced advances in technology are blurring economic and political boundaries so much that the “language of the law is no longer spoken with a single tongue—figuratively and literally” (Wolff in Malmkjær and Windle: 230). Then as now, this might not be ominous news, given the open and forward-looking nature of it. As the power of economics is beyond description, an economic perspective is exactly what legal translation still needs and lacks. In scientific research, the best practical work stems from theoretical understanding, while the best theory emerges from rigorous testing against practical experience. By now, one should be able to realize and accept that economics, while blessed with a powerful methodology, does not offer one simple formula, with which translators get to mechanically act and react in a particular legal translation situation. If only it were that simple! Legal translation, however complex or “impossible”, is absolutely necessary, and such necessity is self-evident, as it now forms an integral dimension to the legal regimes of legally multilingual, multicultural and “multi-jural” jurisdictions like the European Union, Switzerland and Canada (and counting...). The idea of dismissing the validity of legal translation altogether just because true legal translation—or just translation in general—is impossible is simply absurd, as George Steiner reiterates (Steiner 250). If anything, legal translation should be attempted and refined if it cannot be done to absolute perfection yet, and maybe in doing so legal translation professionals will be able to make the impossible possible (or at least not *so impossible*). What economic methodology means for us is that it is good at explaining many aspects of translation, performative or cognitive, in a fairly consistent and coherent way, even though this in no way suggests that economics—along with its core values—will necessarily yield something neutral. Therefore, again, it is my strong and unwavering position that an economic turn will provide legal translation with a perspective that was largely overlooked by all prior turns of translation studies—without, for the record, replacing or substituting any of them.

Furthermore, a different case should be made for courtroom interpretation, arguably a genre of legal translation and at the same time a special form of consecutive interpreting. Since it would be complicated (though not totally impossible) to grant the two language versions equal legal status (i.e., equal evidentiary value), because of a number of interrelated reasons. This would be, however, something worth delving into and thus worthy of another research. As interpreting scholars have argued, the hiatus in courtroom interpreting research is now—finally—being noted and reflected in scholarship (Shlesinger and Pochhacker 2010: 1), with increasing academic attention reflected in a growing corpus of research. As a follow-up to this question, the correlation between legal translation (in particular, courtroom interpreting) and criminal justice, or more broadly, the rule of law, should be further investigated with more statistically rigorous methods (e.g., where legal translation is carried out on a regular basis, the better it is done, the more the rule of law can be upheld, and, as a result, ordinary citizens—who are all rational and self-interested human beings—would have more respect for the law and adjust their behaviour accordingly), but this will be no easy task. Apparently, there is a risk that such endeavour would beg some further questions on which we might either come full circle or end up in a dead end eventually.

I think that, no matter what, legal translation (this includes courtroom interpretation) will always be harder for some language pairs than for others, and this has to do with both the discrepancy arising from the languages concerned and the inherent incompatibility of the legal traditions (or even just the legal regimes) concerned. Language is unique to the human race, and it is my strong belief that a language—any language, as a communication tool, invariably has its own unique, local and intrinsic vocabulary (there are allegedly 20 terms for describing snow in the Inuit language) and/or features/categories (some languages, such as French and Spanish, have two definite articles, while some languages, such as Finnish and Russian, do not have articles at all; some languages have verb tenses, such as most western languages, while there is arguably no tense at all in Chinese).<sup>263</sup> Law, or in a higher order, legal tradition is also exclusive to mankind, and each legal tradition and legal regime invariably comes with its inherent and unique logic that is reflected in its vocabulary and

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<sup>263</sup> Of course, in no way does this imply that some languages are poorer or richer than others; instead, as linguist Lyons claims, all living languages are “efficient systems of communication”. *Vide* John Lyons, *Language and Linguistics*, 1981, p. 31.

terminology, which, in turn, are reflective of its culture, history and mode of thought. As has been established by anthropologists and psychologists, language has both a cultural and a biological dimension to it, and while the human language faculty may be a biological thing, one's knowledge and acquisition of one's native language is a cultural thing. As has been shown in the Berlin-Kay analysis, for any lexical domain, while there may be a universal substructure of semantic distinctions within it, there will always be a non-universal—and perhaps more powerful—superstructure that is culture-dependent and culture-specific that accompanies it (Lyons 316). This applies to terminology regarding law and legal tradition, two domains of human construction. Thus, it would apparently be nearly impossible for two legal languages to share the same legal culture, and even within the same legal tradition, there might still be some cultural phenomena that cannot be shared across two languages, which will likely have their very different tastes and senses cast on a universe of realities that has no limits.

As a consequence, legal translation, a human activity that traverses both domains (language and law), will always be something very complex and relative. Complex or not and relative or not, legal translation is an economic activity that involves repeated decision making in that it reflects the fundamentally rational and self-interested nature on the part of the legal translator and also the cultures the languages represent in light of the purpose of the specific task at a specific time and place for a specific audience. All too often people are ready to “identify” the link between language and culture, and since law is one important aspect of culture, a correlation between law and language can comfortably be assumed.<sup>264</sup> No one human language can capture every concept (and this includes legal concepts) imaginable, and this is precisely where the issue of translatability of law comes up. In light of Lyons' thesis, the translatability of law (or of anything) can fail and come to a halt at any time and in any place (Lyons: 312), and this is not just because of lexical gaps. When this happens, it is the legal translator who must determine what to do with the propositional context of what is being expressed and intended by the law, and this, of course, will

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<sup>264</sup> This view of mine loosely corresponds with the Sapir-Whorf hypothesis that language determines thought (i.e., determinism) (the strong version), and there is no limit to the structural diversity of language (the weak version). However, thanks to the productive and versatile nature of the language system, members of any group/community can *code* for themselves—however tentatively—what is of particular concern to them. The “codeability” of terms and lexemes in this sense roughly corresponds with the translatability for the legal translator.

necessitate every economic feature/locus that was presented and discussed in detail in this thesis.

Overall, all the legal regimes and all the jurisdictions—and more broadly—all the legal traditions covered in this thesis may have made good examples, but there might still be some room for improvement in some areas, such as parallel evidentiary value to witness testimony that is given in a foreign language before a court, as well as co-drafting for a larger number of official languages in more jurisdictions. My hope in highlighting these issues lies in the higher likelihood that they will be taken more seriously by the legal profession and also by professional translators and translation theorists, not to mention that the law, cold and hard as it is, applies to everyone indiscriminately—whether they speak the official language of the venue or not—and this is when and where legal translation comes into play. While there have not been many loud voices calling for a field by the name “legal translation studies” (or LTS) yet, there is a consensus in granting legal translation professionals greater respect—for the sake of rule of law or, simply, justice (Ramos 261).

For so many years, translation theorists have been bemoaning the ultra-low and despicable social status of translators along with the low intellectual standing of translation studies, and now is the time to change all that—with the help of economics. The economic approach, as powerful as it is in explaining and justifying things in a scientific manner, should be further applied to every aspect of legal translation (and maybe beyond that...on all genres of translation), and, by inference, even every subfield within translation studies. Legal translation can be explained from an economic perspective, on the assumption that all human beings (the legal translator included, of course) are rational and self-interested profit maximizers. It can be explained through economics just as persuasively as through sociology. On top of that, legal translation across legal tradition lines (say from English-based common law into French-based civil law) is even more complex, in which case economics could explain why the legal translator in this case, confronted with a number of possible choices, actually translates the way he does (It could be physical length, textual alignment or just personal preference). While economics might be in a position to provide a satisfactory *ex post* answer to every question, it does, by providing a one-of-its-kind

perspective, even a better job identifying questions *ex ante*. Put alternatively, the legal translator decides to render *droit* as “right” (instead of “law”) in a particular context because he would have more to gain—either financially or psychologically—this way, and next time we see the French term *droit*, we will then be in a better position to draw a rough generalization and predict how it will be translated without being surprised too much—provided that all relevant circumstances remain comparable. Therefore, legal translation advocates and practitioners alike just might do themselves a great service by experimenting with more economic loci/paradigms—maybe even ones that were never covered in this research or even postulated by anyone at all, such as human agency (well, the translator is an agent trying to “do someone a favor” without doing himself a disservice after all, is he not?) and proxy (or proxy index) (what are the qualities of a competent legal translator?) and risk management (why do some legal translators seem so conservative with their choice of terms and style...and would there be any way to shield the translator from undue risks with some form of insurance?), and accounting in an export-import economy supported by a net capital flow (how, for instance, the “hegemonic” export of the English language, as Venuti so strongly laments, is to be reflected in the books of an import-based economy in the form of an inward investment which might contribute to a net trade deficit) and so on. True, there have always been concerns and apprehension about the validity of economic analysis due to the character and temperament typically defined by emotion of the economic analyst (who is, of course, an economic being himself no different than any legal translator or legal professional), but still this does not change the fact that economic analysis has proven very helpful in the design of policies in many contexts (Polinsky 166). This might be particularly true for officially bi-/multilingual jurisdictions, as language policy, without a doubt, constitutes a prominent aspect of public policy, and it undoubtedly has a great bearing on legal translation policy. This, I believe, is good news, as it serves as a morale boost for advocates of economic methodology, as well as for descriptive translation theorists, who are dedicated to the development of more shifts and turns for their discipline in an effort to ascertain the true nature of translation.

But our vision of an economic approach to legal translation must not end there. In light of the path that law and economics has had to come down, as well as the renewed dynamics between law and economics (the two individual disciplines) that occurred as a result of the



emergence and development of law and economics (as one discipline), academics in both disciplines now understand the need to learn from one another by taking a mutually complementary approach to a wide range of issues, as I have stressed time and again in this research. Now I would like to see the same thing happening for translation studies and economics, and this should not be difficult, as there have already been translation theorists who noticed that translation is a decision process involving various agents, and all we need to do now is continue building on what is readily available. I sincerely hope that, some day, not only will we appreciate economic methodology for legal translation research, the most central theme of my research, but the enterprise of translation studies and its propositions could also become an inspiration for economists and their research. This should not take too long as translation studies has long dedicated itself to turns and shifts, and a robust interaction between the economic turn and the sociological turn, despite their age difference in “translation studies years”, should not be something unfathomable, especially considering the deepening of cooperation and interaction between sociologists and economists in many contexts such as the interaction between law and economics and law and society (as two fields of research), and also in contexts such as the formation and decay of interdisciplinary networks from both the economic perspective and the sociological perspective and how the two perspectives could be melded into one (Rauch 147 *et seq.*). Put another way, in our age of interdisciplinarity, the similarities, the differences and the interaction between two enterprises (in our case, the economic turn of translation and the sociological turn of translation) should themselves become objects of research in their own right.

Please take note, though, that in no way does this mean that the contributions made by translation theorists or even other social scientists will have to be ignored or marginalized; even comparative law, an area within legal science that has had its unavoidable share of criticism, must be engaged for its thesis on the interaction among legal traditions and legal regimes. Contrary to popular belief amongst academics, an interdisciplinary link that is symbiotic and mutually beneficial might seem like a long shot at this point, and there may not be any easy and fast access to it, but it definitely should sit somewhere high on the agenda.

Last but not least, chaos theory, or “chaology”<sup>265</sup> as some prefer to call it, may be able to shed some light on legal translation, or even on translation studies as an integral whole. By chaos, I am referring to extreme sensitivity to ignorance (Barrow 2008: 270). In the academic world, many things do not get properly accounted for not because scientists are incapable of predicting the phenomena concerned, but because of their less-than-perfect knowledge of the state of the subject matter under research. It is precisely this type of sensitivity of the future to the present that sometimes results in unexpected outcomes that caused curiosity among chaologists (Ibid. 271). And what does this all mean for translation, despite chaos theory’s status as a mathematical thesis? One possible theory is that what sets a piece of good legal translation apart from a defective one is merely the desire to read the same thing time and again, as each read will possibly result in an unprecedented overall experience. Despite the general impression that chaos deals with uncertainty of the universe and ignorance on the part of human beings, chaos does not mean the end of the world (Ibid 272). This, I think, will likely make a very good direction of research—or at least an recommendable perspective—for future translation theorists.

Most of all, I also hope that with my research, in the light of the interdisciplinary nature of translation studies, the interdisciplinary relation between translation studies and economics or that between translation studies and comparative law could someday become a reciprocal one, which will, in turn, facilitate closer cooperation on mutual grounds thereby enriching all disciplines concerned. It is also my humble wish that my vision on an economic turn will lead to the discovery and invention of more new turns in translation scholarship (after an economic turn may come a “psychological turn” and then, who knows what...). Before my thesis officially terminates, in response to moral philosopher Michael Sandel, who has been quoted quite a few times herein, I truly believe that our attitude towards markets and assigning a value to everything ultimately does indeed refer back to the question about how we want to live together, and an economic approach to legal translation, a process that generates and devises a market, or at least a shadow market, carved out of the translation phenomenon will be an excellent way of improving the quality of that life—for legal translators, yes, but also for every individual whose life depends on legal translation.

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<sup>265</sup> For the sake of simplicity and due to space constraints, herein, chaos theory will refer to the field of study in mathematics that studies the behavior of dynamical systems that are highly sensitive to initial conditions.

Together, let's deepen our thinking about simple things.

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